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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| VICKI J. AZNARAN and RICHARD N. AZNARAN,<br><br>Plaintiffs,<br><br>vs.<br><br>CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al.,<br><br>Defendants.<br>AND RELATED COUNTERCLAIMS. | CASE No. CV 88-1796 JMI (Ex)<br><br>REVISED NOTICE OF MOTION AND MOTION TO SEAL PRIOR SETTLEMENT AGREEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF PETER M. JACOBS<br><br>DATE: November 18, 1991<br>TIME: 10:00 a.m.<br>CTRM: Hon. James M. Ideman |

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 18, 1991 at 10:00 a.m. in the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012, defendants Church of Scientology International, Religious Technology Center, Church of Spiritual Technology and Author Services, Inc. will appear and move this Court for an order sealing a confidential document submitted to this Court by plaintiffs Vicki and Richard Aznaran on September 4, 1991. As grounds therefor, defendants state that the document in question is a Mutual Release of all Claims and Settlement Agreement executed by Gerald Armstrong, a non-party to this action, and defendant Church of Scientology of California. By its own terms, the signatories to the document were prohibited from disclosing it to third parties. Although defendants object generally to the document's introduction before this Court, defendants request that the document, now part of the record in this case, be placed under seal to prevent further improper disclosure to the public.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the file of the case herein and such other and further evidence that may be submitted at oral argument of this motion.

Dated: October 7, 1991

Respectfully submitted,

WILLIAM T. DRESCHER

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MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

On December 6, 1986, Gerald Armstrong entered into a Mutual Release of All Claims and Settlement Agreement (the "Agreement") with defendant herein Church of Scientology International ("CSI") in Church of Scientology of California v. Armstrong, LASC No. C420153. ("Armstrong"). Pursuant to its terms at 18(D), the parties to the Agreement each agreed not to disclose its contents.[1] Despite this clear term, Armstrong provided plaintiffs herein with a copy of the Agreement, a declaration concerning it, and four other exhibits, which plaintiffs' attorney filed with this Court on September 4, 1991. To preserve their rights to the confidentiality of the Agreement, defendants move to have that Declaration of Gerald Armstrong dated September 3, 1991 ("the Declaration") and its accompanying Exhibit 1 - the Agreement - placed under the seal of the Court.

## II. STATEMENT OF FACTS

Plaintiffs filed the Declaration and the Agreement in a purely gratuitous fashion: It accompanied no motion, request or other pleading, nor was it attached to any opposition or reply to a motion, request or other pleading. In this sense it appears to be another stray pellet from plaintiffs' shotgun;

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[1] Defendants Religious Technology Center ("RTC") and Church of Scientology of California ("CSC"), while not parties to the Agreement, are specific third-party beneficiaries of the Agreement and are equally bound by its terms. Hence, all defendants join in bringing this motion.

unfortunately for plaintiffs, however, this bullet has backfired: Courts will not allow the public policy favoring settlement of disputes to be undermined by permitting a party to disregard legal and ethical considerations. The Stipulation to keep the Agreement and its contents private and undisclosed will be enforced wherever the document may illegally travel and to whomever it may be surreptitiously passed. In this regard, this Court should be aware that on July 29, 1991, the Court of Appeal, Second Appellate District, Division Three issued a decision upholding the agreement of the parties upon settlement that the files in the Armstrong matter would remain sealed. [Exhibit A.] This decision reversed an order of the trial court unsealing the file on a limited basis, following a challenge by an individual who was not a party to the underlying action.[2]

Moreover, the full record in the Armstrong action has been sealed since December, 1986, based upon a stipulation of the parties at the time of settlement. Prior to that time, the underlying documents which are the subject matter of the Armstrong suit were sealed during the pendency of the case because of their confidential nature. Indeed, in an abundance of caution, the Armstrong defendants and cross-complainants have recently moved the Court of Appeal to seal the appellate record as well, to ensure that the privacy rights for which

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[2] The lower court file was only unsealed on a temporary basis, and then only to permit a specific moving party, Bent Corydon, and his attorney to have limited access to the file. No portion of the file was ever made generally accessible to the public.

they bargained are maintained despite Armstrong's efforts to breach his Agreement. [Ex. B].

Thus, for virtually the entire period of its existence the Agreement submitted to this Court in September has been confidential, and subject to court sealing. Its confidentiality has been secured by a provision in which each of the parties agreed to protect its contents from disclosure.

Plaintiffs' counsel has admitted by virtue of his September 4 filing that he received the Agreement from Gerald Armstrong. The fact that he, and not Armstrong, submitted it to this Court, and did so in a covert fashion, does not in any manner detract from this Court's duty to protect the confidentiality of the Agreement's contents and ensure it remains sealed in accordance with the mandate of the appellate court.

The sealing of the Armstrong Agreement is particularly compelling here because its submission to this Court constitutes evidence of the third time Armstrong has breached it by providing it to counsel representing parties involved in lawsuits against defendants herein: On March 19, 1990, the Agreement was attached as Exhibit D to a motion filed against defendants herein in Corydon v. Church of Scientology International, Inc., et al., LASC No. 694401 [Exhibit C, Motion only]; on July 19, 1991, the Agreement was attached as Exhibit 1 to a declaration of Gerald Armstrong in Religious Technology Center, et al. v. Yanny, LASC No. BC033035 [Exhibit D,

Declaration only].[3]

The Agreement, of course, cannot be made "public" by the continuous, unlawful violation of its confidentiality clause by a party breaching his agreement to maintain its secrecy. Faced with such willful and knowing violations, defendants herein must now seek immediate redress from this Court to seal the Declaration and Agreement submitted by plaintiff in order to preserve legal rights for which they have bargained and to which they are entitled.

## III. THE APPLICABLE LEGAL STANDARDS PERMIT SEALING THE COURT FILE IN THIS CASE

The United States Supreme Court has long recognized as an "uncontested" proposition that "the right to inspect and copy judicial records is not absolute" and that "every court has supervisory powers over its own records and files...." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598, 98 S.Ct. 1306, 1312 (1988); see Champion v. Superior Court, 201 Cal.App.3d 777, 787, 247 Cal.Rptr. 624, 629 (1988), quoting in Matter of Estate of Hearst, 67 Cal.App. 3d 777, 783, 136 Cal.Rptr. 821, 824 (1977) ("Clearly, a court has inherent power to control its own records to protect the rights of litigants before it..."). The Supreme Court has explained that denial of access to judicial records may be appropriate in a variety of situations, including for the protection of privacy interests. Nixon v. Warner Communications, 435 U.S. at 598.

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[3] Defendants have also moved for sealing of this portion of the record in each of the other cases in which the Agreement has been introduced.

The appropriateness of such denial of access to the Agreement in this case is obvious when one considers that it is the policy of California's Courts to encourage settlements and to enforce judicially supervised settlements. Phelps v. Kozakere, 146 Cal.App.3d 1078, 1082, 194 Cal.Rptr. 872, 874 (1983); Fisher v. Superior Court, 103 Cal.App.3d 434, 437, 440-441, 163 Cal.Rptr. 47, 49, 52 (1980). See also in re Franklin National Bank Securities Litigation, 92 F.R.D. 468 (E.D.N.Y 1981), aff'd sub. nom. Federal Deposit Insurance Corp. v. Ernst & Ernst, 677 F.2d 230 (2nd Cir. 1982), where the court refused to modify a confidentiality order critical to settlement of the case based upon the "strong public policy favoring settlements of disputes," the resulting injustice to the litigants and undermining of future settlements based on confidentiality.

The principles which underlie the ruling of the Franklin litigation apply as well to the sealing of the settlement agreement which appeared without defendants' consent or notice in the instant case. The confidentiality of the Agreement was a stipulation vital to defendants in settling the Armstrong matter. Both parties therein agreed to it. The fact that defendants must now seek enforcement of the Agreement in a court other than that which approved it makes the public policy argument favoring settlements no less persuasive and this Court's obligation to enforce the Agreement no less critical.

Two very recent cases from the Eleventh Circuit Court of Appeals present anew persuasive reason why this Court should grant defendants' motion and seal the Declaration and the Agreement.

In Wakefield v. Church of Scientology of California, ___ F.2d ___, Slip.Op. 4625 (11th Cir. 1991) [Exhibit E], plaintiff Wakefield settled a case with defendant Church, and then repeatedly violated her settlement agreement by violating its confidentiality provisions. The Church brought contempt proceedings against Wakefield, and sought to have the proceedings in camera, in order to protect the very privacy rights placed at issue by Wakefield's conduct. According to the Eleventh Circuit, the district court ordered that contempt proceedings commence before a magistrate, and closed the proceedings in the public and press stating:

> [D]ue to plaintiff's complete and utter disregard of prior orders of this court, the court concludes that any restriction, short of complete closure would be ineffective. ... Publicity of a private crusade has become her end, not the fair adjudication of the parties' dispute. In doing so, plaintiff is stealing the court's resources from other meritorious cases.

Ex. E, Slip Op. at 4627.

Various newspapers protested and appealed the closure order. At the conclusion of the closed proceedings, the magistrate found that Wakefield had willfully violated the court's injunction, and recommended criminal contempt proceedings. The district court granted the newspapers access to some of the transcripts of the hearings, but refused to permit them access to those which discussed the terms of Wakefield's settlement agreement -- that is, those portions of the proceedings which were permeated with discussions of matters which Wakefield and the Church had agreed to keep confidential, and which the Church had brought contempt

proceedings to protect. On appeal by the newspapers, the Eleventh Circuit upheld the privacy interests which the Church sought to protect, and refused to grant public access to any more of the record. Id. at 4629-4630.

In McLean v. Church of Scientology of California, __ F.2d __ No. 89-3505 (11th Cir. 1991) [Exhibit F], plaintiff McLean similarly entered into a settlement agreement containing confidentiality provisions requiring her to return documents to defendant Church and prohibiting her from discussing the litigation with anyone outside her immediate family. By her own testimony plaintiff admitted to reacquiring certain documents and using them to "counsel" Church members. She further admitted to discussing certain aspects of the suit with people outside her immediate family. As a result the appellate court affirmed the district court order permanently enjoining McLean from disclosing any information about her lawsuit and the resulting Settlement Agreement entered into between the parties. (emphasis added)

## IV. CONCLUSION

Defendant Church of Scientology International entered into a settlement agreement in another case, a provision of which requires that Agreement to remain confidential. The other party in that matter willfully and knowingly breached the Agreement by providing it to plaintiff herein, who then submitted it to this Court during its proceedings. Defendants seek to preserve their bargained-for privacy benefit and to protect their legal rights under the Agreement. This Court can and should preserve the sanctity of that Agreement by granting

defendants' motion to seal both the Agreement and the Declaration to which it is attached.

Dated: October 8, 1991

Respectfully submitted,

WILLIAM T. DRESCHER

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Attorneys for Defendant AUTHOR SERVICES, INC.

DECLARATION OF PETER M. JACOBS

I, Peter M. Jacobs, hereby declare:

1. I am an attorney duly licensed to practice law in the State of California. I am an associate with the law firm of Bowles & Moxon, counsel of record for some of the defendants in Aznaran v. Church of Scientology of California, et al., Case No. CV 88-1786 JMI(Ex).

2. Attached hereto as Exhibit A is a true and correct copy of an order of the California Court of Appeal, Second Appellate District, Division Three in the case of Church of Scientology of California v. Armstrong, Appellate Case. Nos. B025920 and B038975.

3. Attached hereto as Exhibit B is a true and correct copy of a Notice of Motion and Motion to Seal Record on Appeal; Memorandum of Points and Authorities, filed in the case of Church of Scientology of California v. Armstrong, Case No. B02590 & B038975, Court of Appeal of the State of California, Second Appellate District, Division Three.

4. Attached hereto as Exhibit C is a true and correct copy of a Notice of Motion and Motion for an Order Directing Non-Interference with Witnesses and Disqualification of Counsel, filed in the case of Corydon v. Church of Scientology International, et al., Case No. C 694401, Los Angeles Superior Court.

5. Attached hereto as Exhibit D is a true and correct copy of a Declaration of Gerald Armstrong presented to the Court at a hearing on July 24, 1991 in the case of Religious Technology Center, et al. v. Yanny, et al., Case No. BC 033035, Los

Angeles Superior Court.

6. Attached hereto as Exhibit E is a true and correct copy of a slip opinion of the Eleventh Circuit Court of Appeals in the case of Wakefield v. Church of Scientology of California, Appellate Case. No. 89-3796, entered on August 12, 1991.

7. Attached hereto as Exhibit F is a true and correct copy of a slip opinion of the Eleventh Circuit Court of Appeals in the case of McLean v. Church of Scientology of California, et al., Appellate Case No. 89-3505, entered on September 17, 1991.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, the 7th day of October 1991.

Peter M. Jacobs

**EXHIBIT A**

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., Plaintiffs and Appellants, v. GERALD ARMSTRONG, Defendant and Respondent. | B025920 & B038975 (Super.Ct.No. C 420153) |



Appeal from a judgment and an order after judgment of the Superior Court of Los Angeles County. Paul G. Breckenridge, Jr., and Bruce R. Geernaert, Judges. Judgment affirmed; order reversed.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman, Bowles & Moxon, Eric M. Lieberman, Timothy Bowles, Kendrick L. Moxon and Michael Lee Hertzberg for Plaintiffs and Appellants.

Gerald Armstrong, In Propria Persona, Toby L. Plevin, Paul Morantz and Michael L. Walton for Respondent.

Lawrence Wollersheim, Amicus Curiae, on behalf of Respondent.

In consolidated appeals, the Church of Scientology (the Church) and Mary Sue Hubbard (hereafter collectively "plaintiffs") appeal from an order after appealable judgment unsealing the file in Church of Scientology of California v. Gerald Armstrong (B038975), and from the judgment entered in the case (B025920). We vacate the order and affirm the judgment.

## FACTS AND PROCEDURAL HISTORY

In the underlying action, the Church sued Armstrong, a former Church worker, alleging he converted to his own use confidential archive materials and disseminated the same to unauthorized persons, thereby breaching his fiduciary duty to the Church, which sought return of the documents, injunctive relief against further dissemination of the information contained therein, imposition of a constructive trust over the property and any profits Armstrong might realize from his use of the materials, as well as damages. Mary Sue Hubbard (Hubbard), wife of Church founder L. Ron Hubbard, intervened in the action, alleging causes of action for conversion, invasion of privacy, possession of personal property [sic], and declaratory and injunctive relief. Armstrong cross-complained, seeking damages for fraud, intentional infliction of emotional distress, libel, breach of contract, and tortious

interference with contract.

With respect to the complaint and complaint-in-intervention, the trial court found the Church had made out a prima facie case of conversion, breach of fiduciary duty, and breach of confidence, and that Mary Sue Hubbard had made out a prima facie case of conversion and invasion of privacy. However, the court also determined that Armstrong's conduct was justified, in that he believed the Church threatened harm to himself and his wife, and that he could prevent such harm by taking and keeping the documents.

Following those determinations the court made and entered an order, entitled "Judgment," on August 10, 1984,[1/] ordering and adjudging that plaintiffs take nothing by their complaint and complaint-in-intervention, and that defendant Armstrong have and recover his costs and disbursements. Plaintiffs filed notice of appeal from that order.

We dismissed the appeal (B005912) because that "judgment" was not a final judgment and was not appealable; Armstrong's cross-complaint had not yet been resolved and further judicial action was essential to the final determination of the rights of the parties. (Lyon v. Goss

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1/ The "judgment" of August 10, 1984, is not included in the present record on appeal. However, it is included in the petition of plaintiffs and appellants for review by our Supreme Court of our decision (B005912) in this case, filed December 18, 1986.

(1942) 19 Cal.2d 659, 670.)

Armstrong's cross-action was then settled and dismissed, the subject documents were ordered returned to the Church, and the record was sealed by Judge Breckenridge pursuant to stipulation of the parties. The dismissal of Armstrong's cross-action was a final determination of the rights of the parties, and constituted a final judgment, permitting appellate review of the court's interlocutory order captioned "judgment" filed August 10, 1984.

Plaintiffs then timely filed a new notice of appeal (B025920), from the orders entitled "Order for Return of Exhibits and Sealed Documents" and "Order Dismissing Action With Prejudice," both filed December 11, 1986, and from the "Judgment" filed August 10, 1984, stating that the appeal was "only from so much of those orders and judgment which denied damages to plaintiff and plaintiff-intervenor" on their complaints. We rule that the Order Dismissing Action With Prejudice is the appealable judgment in B025920.[2/]

The Unsealing Order After Judgment (B038975)

On October 11, 1988, Bent Corydon, who is a party

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2/ We later granted the motion of appellant Church to deem the record on appeal in B005912 to be the record on appeal in B025920, which is one of the current consolidated appeals; we also take judicial notice of the entire record in B005912. Consequently the reporters' transcript, the appendices of the parties on appeal, and the parties' briefs in case No. B005912 are part of the record on appeal in B025920. The parties have also filed briefs in B025928.

to other litigation against the Church, moved to unseal the record in this case for the purpose of preparing for trial of his cases. He sought only private disclosure. Judge Breckenridge having retired, Corydon's motion was heard by Judge Geernaert, who made an order dated November 9, 1988, which he clarified by another order dated November 30, 1988, which opened the record not only to Corydon but also to the general public, thus vacating the earlier order made by Judge Breckenridge.

On December 19, 1988, plaintiffs Church and Hubbard filed a timely notice of appeal from those orders made after appealable judgment. That appeal, B038975, is the other of the current consolidated appeals.

On December 22, 1988, Division Four of this court issued an order staying Judge Geernaert's orders (1) unsealing the record and (2) denying a motion for reconsideration of the unsealing order, to the extent those orders unsealed the record as to the general public and permitted review by any person other than Corydon and his counsel of record. On December 29, 1988, Division Four modified this stay order by adding to it a protective order prohibiting Corydon and his counsel from disseminating copies of or disclosing the content of any documents found in the file to the public or any third party, except to the extent necessary to litigate the actions to which Corydon

and the Church were parties. Corydon and his counsel were also required to make good faith efforts in Corydon's litigation to submit under seal any documents they found in the file of this case.

On this appeal, Corydon argues in favor of the trial court's order unsealing the record, as he wishes to be free of the protective orders contained in the modified stay order issued by Division Four.

The "Judgment" of August 10, 1984 (B025920)

Armstrong's taking of the documents is undisputed. The evidence relating to his claim of justification, which was found credible by the trial court,[3/] established that Armstrong was a dedicated member of the Church for a period of twelve years. For ten of those years, he was a member of the Sea Organization, an elite group of Scientologists working directly under Church founder L. Ron Hubbard. In 1979, Armstrong became a part of L. Ron Hubbard's "Household Unit" at Gilman Hot Springs, California.

In January 1980, fearing a raid by law enforcement agencies, Hubbard's representatives ordered the shredding of all documents showing that Hubbard controlled Scientology organizations, finances, personnel, or the property at

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3/ Plaintiffs' contention that certain testimony was impeached by testimony given in other proceedings subsequent to the judgment herein is, of course, not cognizable on this appeal.

Gilman Hot Springs. In a two-week period, approximately one million pages were shredded pursuant to this order.

In the course of the inspection of documents for potential shredding, Armstrong reviewed a box containing Hubbard's early personal letters, diaries, and other writings, which Armstrong preserved.

Thereafter, Armstrong petitioned for permission to conduct research for a planned biography of Hubbard, using his discovery of the boxed materials. Hubbard approved the petition, and Armstrong, who had discovered and preserved approximately 16 more boxes of similar materials, became the Senior Personal Relations Officer Researcher. He subsequently moved the materials to the Church of Scientology Cedars Complex in Los Angeles.

Hubbard selected one Omar Garrison to write his biography. Armstrong became Garrison's research assistant, copying documents and delivering the copies to him, traveling with him, arranging interviews for him, and generally consulting with him about the project. Armstrong also conducted a genealogical study of Hubbard's family, and organized the materials he had gathered into bound volumes for Garrison's use, retaining a copy for the Church archives. The number of documents obtained by Armstrong ultimately reached 500,000 to 600,000. Within a week after commencing the biography project, Armstrong and Garrison

began to note discrepancies between the information set forth in the documents and representations previously made concerning Hubbard. Then Armstrong was summoned to Gilman Hot Springs, where he was ordered to undergo a "security check" consisting of interrogation while connected to a crude lie-detector called an E-meter, to determine what materials he had delivered to Garrison and to meet charges that he was speaking out against Hubbard.

In November 1981, Armstrong wrote a report urging the importance of ensuring the accuracy of all materials published concerning L. Ron Hubbard, and relating examples of factual inaccuracies in previous publications. In December 1981, Armstrong and his wife left the Church, surreptitiously moving their possessions from the Church premises because they knew that persons attempting to leave were locked up, subjected to security checks, and forced to sign promissory notes to the Church, confessions of "blackmailable" material obtained from their personal files, and incriminating documents, and they were afraid that they would be forced to do the same. Before leaving, Armstrong and his wife copied a number of documents which he delivered to Garrison for his work on the Hubbard biography. After leaving, Armstrong cooperated with his successor, assisting him in locating documents and other items.

Commencing in February 1982, the international

Church of Scientology issued a series of "suppressive person declares" in effect labelling Armstrong an enemy of the Church and charging that he had taken an unauthorized leave, was spreading destructive rumors about senior Church officials, and secretly planned to leave the Church. These "declares" subjected Armstrong to the "Fair Game Doctrine" of the Church, which permits a suppressive person to be "tricked, sued or lied to or destroyed . . . [or] deprived of property or injured by any means by any Scientologist. . . ."

At around the same time, the Church confiscated photographs of Hubbard and others that Armstrong had arranged to sell to one Virgil Wilhite. When Armstrong met with Church members and demanded the return of the photographs, he was ordered from the Church property and told to get an attorney. Thereafter, he received a letter from Church counsel threatening him with a lawsuit. In early May 1982, he became aware of private investigators watching his house and following him.

These events caused Armstrong to fear that his life and that of his wife were in danger, and that he would be made the target of costly and harassing lawsuits. The author, Garrison, feared that his home would be burglarized by Church personnel seeking to retrieve the documents in his possession.

For these reasons, Armstrong took a number of documents from Garrison and sent them to his attorney.

Following commencement of the instant action, Armstrong was pushed or shoved by one of the Church's investigators. In a later incident his elbow was struck by an investigator's vehicle; still later, the same investigator pulled in front of Armstrong on a freeway and slammed on his brakes. This investigator's vehicle also crossed a lane line as if to push Armstrong off of the road. Plaintiffs' position is that the investigators were hired solely for the purpose of regaining the documents taken by Armstrong.

Trial of the complaint and the complaint-in-intervention was by the court sitting without a jury. On August 10, 1984, the court made its order, captioned "Judgment," ordering that plaintiff Church and plaintiff in intervention Hubbard, take nothing by their complaint and complaint-in-intervention and that defendant Armstrong have and recover from each of them his costs and disbursements.

## DISCUSSION

### The Order Unsealing The Record Must Be Reversed

"Although the California Public Records Act (Gov. Code, §§ 6250 [et seq.]) does not apply to court records

(see § 6252, subd. (a)), there can be no doubt that court records are public records, available to the public in general . . . unless a specific exception makes specific records nonpublic. (See Craemer v. Superior Court (1968) 265 Cal.App.2d 216, 220-222 . . . .) To prevent secrecy in public affairs public policy makes public records and documents available for public inspection by . . . members of the general public . . . . [Citations.] Statutory exceptions exist [citations], as do judicially created exceptions, generally temporary in nature, exemplified by such cases as Craemer, supra, and Rosato v. Superior Court (1975) 51 Cal.App.3d 190 . . . , which involved temporary sealing of grand jury transcripts during criminal trials to protect defendant's right to a fair trial free from adverse advance publicity. Clearly, a court has inherent power to control its own records to protect rights of litigants before it, but 'where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.' (Craemer, supra, 265 Cal.App.2d at p. 222.) The court in Craemer suggested that countervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good." (Estate of Hearst, (1977), 67 Cal.App.3d 777, 782-783.)

"If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals. Thus in Sheppard v. Maxwell (1966) 384 U.S. 333, 350 [16 L.Ed.2d 600, 613, 86 S.Ct. 1507], the court said it is a vital function of the press to subject the judicial process to 'extensive public scrutiny and criticism.' And the California Supreme Court has said, 'it is a first principle that the people have the right to know what is done in their courts. (In re Shortridge (1893) 99 Cal. 526, 530 . . . .) Absent strong countervailing reasons, the public has a legitimate interest and right of general access to court records . . . ." (Estate of Hearst, supra, 67 Cal.App.3d at p. 784.)

We are unaware of any showing made before Judge Breckenridge, other than the parties' stipulation, justifying sealing by the trial court of the record in this case. However, inasmuch as the parties agreed to the sealing in December of 1986, and no third party intervened at that time to seek reconsideration or review of the court's order, the order became final long before Corydon intervened in the action almost two years later.

In Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal.App.3d 1583, the court stated at page 1588: "The power of one judge to vacate an order duly made by another judge is limited. In Fallon v. Superior Court (1939) 33 Cal.App.2d 48, 52 . . . we issued a writ of prohibition restraining a successor law and motion judge from vacating an order of his predecessor, stating, 'Except in the manner prescribed by statute a superior court may not set aside an order regularly made.' In Sheldon v Superior Court (1941) 42 Cal.App.2d 406, 408 . . . the Court of Appeal, Second Appellate District annulled the order of one probate judge which vacated the previously made order of another probate judge appointing an administrator, stating 'that a valid order made ex parte may be vacated only after a showing of cause for the making of the latter order, that is, that in the making of the original order there was (1) inadvertence, (2) mistake, or (3) fraud.' Even more on point, in Wyoming Pacific Oil Co. v. Preston (1958) 50 Cal.2d 736, 739 . . . the California Supreme Court reversed the order of a second judge dismissing an action under former [Code of Civil Procedure] section 581a for failure to make service of process within three years, after a first judge had found as a fact that the affected defendant was concealing himself to avoid service of process, quoting Sheldon. [Citation.]" (Fn. omitted.)

In Greene, supra, Alameda County Superior Court Judge Donald McCullum issued general order 3.30, in which he found it impracticable, futile, or impossible to bring certain cases, including Greene, to trial within the applicable five-year limitation period (Code Civ. Proc., § 583, subd. (b)), and extended the deadline for bringing those cases to trial. Thereafter, Judge Richard Bartalini, to whom the case was assigned for trial, dismissed the action, on motion of the defendants, for failure to bring it to trial within five years. The court stated, "[D]efendants were, in effect, asking Judge Bartalini to focus on the particular facts of the case and, in light of those facts, to rethink Judge McCullum's order and to see whether he agreed with it. No statutory authority exists for such a request, and Judge Bartalini erred in granting it. [Citations.] General order 3.30 could 'not be set aside simply because "the court concludes differently than it has upon its first decision."' [Citations.]" (Greene v. State Farm Fire & Casualty Co., supra, 224 Cal.App.3d at p. 1589.)

In our case, Corydon intervened in the action between plaintiffs and Armstrong, seeking access to the sealed record for the limited purpose of preparing his own cases involving the Church. Judge Geernaert, on his own motion, vacated Judge Breckenridge's order sealing the record. The time had long since expired for reconsideration

of Judge Breckenridge's order (Code Civ. Proc., § 1008), or relief therefrom pursuant to Code of Civil Procedure section 473, and the parties had the right to rely on the sealing order. No showing was made other than that supporting Corydon's motion for access to the record.[4/] We hold Judge Geernaert exceeded his authority in vacating Judge Breckenridge's order sealing the record.[5/]

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[4/] Plaintiffs do not challenge Corydon's access to the record, stating in their brief: "Corydon's access must continue to be limited by the conditions imposed thus far by this court's Modified Temporary Stay Order . . . . He sought access only for use in private litigation against the Church; this court's order, which permits him to use the information he obtains only in said litigations and only after making a good faith effort to have it introduced under seal, is appropriately tailored to meet his asserted need without unnecessarily invading appellants' privacy." Pursuant to the stay order issued by Division Four, Corydon has had the desired access since December 22, 1988, and the issue is moot as to him. He now seeks in this court more than he sought by his motion in the trial court.

[5/] Armstrong, who did not participate in the hearing on the motion below, has filed a brief claiming the record should be unsealed because the Church has failed to comply with the terms of its settlement agreement with him. His declarations to the latter effect are not properly before us on this appeal, as they were not considered by the trial court. We therefore consider neither the meaning of the portions of the settlement agreement to which he refers nor the question whether the Church has complied therewith.

We are also in receipt of an amicus curiae brief of Lawrence Wollersheim, who urges unsealing of the record based on reasons of public policy. Wollersheim's argument is directed primarily to the documentary exhibits lodged in the underlying case. Those documents have been returned to the Church in accordance with the terms of the settlement agreement.

interest of the party in confidentiality outweighs the public policy in favor of open court records. 'The law favors maximum public access to judicial proceedings and court records. [Citations.] Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons.' [Citation.]" (Id. at p. 788.)

Plaintiffs cite Champion, claiming, inter alia, that the appellate court, in granting the motion to seal in that case, stated it was "influenced by the parties' agreement to the procedure and by the lower court's sealing

of its records." The quoted language appears at page 786 of the decision, and refers to the court's initial response to requests to seal received in connection with the petition, opposition, and amici curiae requests. Later, after receiving "rebuttal briefs, rebuttal declarations, reply to amici, declarations in reply to amici, and supplemental declarations," (Champion v. Superior Court, supra, 201 Cal.App.3d at p. 786) resulting in a file containing "some sealed documents, some public documents, and many documents not yet designated as sealed or public," (ibid.) most of which blended together discussions of confidential and public materials, as well as requests to seal all of the documents without any explanation of why any of the documents deserved such treatment (ibid.), the court stated, at page 787, "it is apparent that we acted precipitously in granting the earliest, unsupported, requests to seal documents lodged or filed in this matter." While the court did ultimately grant the application to seal the entire file, it did so because of the confusion and undue complication and delay that would be caused by return of the documents for segregation into public and confidential portions. (Id. at pp. 789-790.)

In our case, plaintiffs have not formally requested sealing of the record on appeal. They argue, in seeking reversal of Judge Geernaert's order vacating the sealing

order made in the trial court, that their pursuit of an action brought primarily for the purpose of protecting their respective privacy interests in the documents converted by Armstrong should not cause disclosure of the very information they sought to protect, through references in the record to such information. The argument is not limited to any particular portion or portions of the voluminous record of the trial court proceedings. Should plaintiffs move to seal the record on appeal, we would require a much more particularized showing.

The Defense of Justification Applies To The Causes Of Action Alleged Against Armstrong; The Judgment Is Affirmed

"One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." (Rest.2d Torts, § 652A (1).) "The right of privacy is invaded by [¶] (a) unreasonable intrusion upon the seclusion of another, . . . or . . . (c) unreasonable publicity given to the other's private life . . . ." (Rest.2d Torts, § 652 A (2).) "The rules on conditional privileges to publish defamatory matter stated in §§ 594 to 598A, and on the special privileges stated in §§ 611 and 612, apply to the publication of any matter that is an invasion of privacy." (Rest.2d Torts, § 652G.) Under section 594 of the Restatement "[a]n occasion makes a

publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

"Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge." (Res.2d Agency, § 395.) However, "[a]n agent is privileged to protect interests of his own which are superior to those of the principal, even though he does so at the expense of the principal's interests or in disobedience to his orders." (Res.2d Agency, § 418.)

With respect to plaintiffs' causes of action for conversion, "[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under

the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose." (Res.2d Torts, § 261.) "For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, or that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. (See § 63.) A similar privilege is afforded an actor for the protection of certain third persons. (See § 76.)" (Res.2d Torts, § 261, com.)

We find no California case, and the parties cite none, holding that the above described privileges apply in this state.[6/] We believe the trial court appropriately

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6/ No purpose would be served by our engaging in an exhaustive discussion of each of the points asserted by plaintiffs.

For example, plaintiffs misconstrue the decision in Dietemann v. Time, Inc. (1971) 449 F.2d 245. The Dietemann court stated: "Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication." (Id. at pp. 249-250.) The question in that case was whether the defendant, whose employees gained entrance to plaintiff's home by subterfuge and there photographed him and recorded his conversation without his

(Footnote Continued)

adopted the Restatement approach respecting conditional privilege. (See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 278, p. 360; Gilmore v. Superior Court (1991) 230 Cal.App.3d 416, 421.)

In its statement of decision the court found Armstrong delivered the documents in question to his

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(Footnote 6 Continued)

consent, was insulated from liability by the First Amendment because its employees did these acts for the purpose of gathering material for a magazine story which was thereafter published. The case has nothing to do with the justification asserted herein. Pearson v. Dodd (1969) 410 F.2d 701, is similarly inapposite.

Discussing the privilege of an agent set forth in section 418 of the Restatement, plaintiffs point to the last sentence of comment b, which reads: "So, too, if the agent acquires things in violation of his duty of loyalty, he is subject to liability for a failure to use them for the benefit of the principal." This language has reference to the initial sentence of the comment: "If the conflict of interests is created through a breach of duty by the agent, the agent is subject to liability if he does not prefer his principal's interests." In the present case, the conflict was created by the plaintiffs, who threatened Armstrong with harm.

Referring to comment b to section 396 of the Restatement Second of Agency, which has to do with the use of customer lists in unfair competition, plaintiffs urge that even if Armstrong was privileged to verbally report to others information he gained in his capacity as an agent of the Church, he would not be privileged under any circumstances to retain or disseminate Church documents. They also urge, based on cases which are inapposite to that at bench, that the justification defense applies only in emergency situations requiring immediate action to avert danger, or where the agent believes that the principal's documents are the fruits or instrumentalities of crime or fraud. The court found, on substantial evidence, that Armstrong was under a reasonable apprehension of danger when he delivered the documents to his attorney. More was not required.

attorney ". . . because he believed that his life, physical and mental well-being, as well as that of his wife, were threatened because the organization was aware of what he knew about the life of L. Ron Hubbard, the secret machinations and financial activities of the Church, and his dedication to the truth. He believed that the only way he could defend himself, physically as well as from harassing lawsuits, was to take from Omar Garrison those materials which would support and corroborate everything that he had been saying within the Church about L. Ron Hubbard and the Church, or refute the allegations made against him in the April 22 Suppressive Person Declare. He believed that the only way he could be sure that the documents would remain secure for his future use was to send them to his attorneys, and that to protect himself, he had to go public so as to minimize the risk that L. Ron Hubbard, the Church, or any of their agents would do him physical harm." The court's findings were substantially supported by the evidence adduced at trial.

Admission of Documentary and Testimonial Evidence Over Appellants' Objections Did Not Result In A Miscarriage of Justice

Armstrong's defense was predicated on his claim that he reasonably believed the Church intended to cause him harm, and that he could prevent the apprehended harm only by

taking the documents, even though the taking resulted in harm to the Church.

Plaintiffs complain of the trial court's admission of documentary and testimonial evidence concerning the history of Armstrong's relationship with the Church, and certain practices of the Church in relation to its members, as well as its former members and/or critics. The record is replete with statements of the court's recognition of the limited purpose for which the complained of statements were properly admitted, i.e, to prove Armstrong's state of mind when he converted the Church's documents. These statements are referenced in Armstrong's briefs, and acknowledged by plaintiffs.

Plaintiffs complain that certain testimony of defense witnesses was irrelevant, as there was no showing that Armstrong was aware of the facts to which the witnesses testified. The testimony in question was largely corroborative of Armstrong's testimony with respect to Church practices affecting his state of mind, and was relevant to the issue of the reasonableness of his belief that the Church intended to cause him harm.

Plaintiffs complain, finally, that the trial court's statement of decision shows the court improperly considered the evidence admitted for the limited purpose of establishing Armstrong's state of mind. We are satisfied

the complained of comments reflect the court's findings on the elements of the justification defense asserted by Armstrong, and that neither the admission of the evidence nor the court's comments resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)

DECISION

The judgment is affirmed. The order vacating the order sealing the record in the trial court is reversed. Each party to bear its own costs on this appeal.

CERTIFIED FOR PUBLICATION

DANIELSON, J.

We concur:

KLEIN, P.J.

HINZ, J.

EXHIBIT B

Case Nos. B025920 & B038975

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Plaintiff-Appellant,

and

MARY SUE HUBBARD

Intervenor-Plaintiff-Appellant,

v.

GERALD ARMSTRONG,

Defendant-Respondent.



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**NOTICE OF MOTION AND MOTION TO SEAL RECORD ON APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KENNETH LONG**

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Appeal from the Superior Court of the State of California for the County of Los Angeles
Honorable Bruce R. Geernaert, Judge
Case No. C420153

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| CHURCH OF SCIENTOLOGY OF CALIFORNIA,<br><br>Plaintiff-Appellant,<br><br>and<br><br>MARY SUE HUBBARD,<br><br>v.<br><br>GERALD ARMSTRONG,<br><br>Defendant-Respondent. | Case Nos. B025920 & B038975<br><br>LASC No. C420153<br><br>NOTICE OF MOTION AND MOTION TO SEAL RECORD ON APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KENNETH LONG |

Plaintiff Church of Scientology of California ("CSC") and Intervenor Mary Sue Hubbard ("Mrs. Hubbard") hereby move the Court for an order sealing portions of the record on appeal.

This motion to seal is made on the ground that the case was filed to vindicate property and privacy interests that had been invaded by defendant, and to leave these portions of appellate record unsealed will result in further violations of those interests. In addition, the trial court found that documents in issue in this case were stolen from plaintiff, and that CSC "had made out a prima facie case of conversion, breach of fiduciary duty, and breach of confidence, and that Mary Sue Hubbard had made out a prima facie case of conversion and invasion of privacy." When the case was settled in December 1986, the parties entered into a stipulation that the court

files would be sealed, and the July 29, 1991 decision of this Court upheld the validity of that stipulation against a challenge by an individual who was not a party to the underlying action, and ruled that the files below should remain sealed pursuant to agreement of the parties upon settlement. This action was the only method available to appellants to protect their rights, and the sealing of the files is therefore proper.

This motion is based on this notice of motion and motion, the attached Declaration of Kenneth Long, the attached Memorandum of Points and Authorities, the Brief of Appellants, Reply Brief of Appellants and Response to Cross Appeal, the record on appeal and the briefs on file herein.

DATED: September 11, 1991

Respectfully submitted,

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OTHER AUTHORITIES

I.

PRELIMINARY STATEMENT

On July 29, 1991, this Court issued its decision in this case reversing an Order of the trial court unsealing the file in Church of Scientology of California v. Armstrong (B038975). The Court ruled that the trial court files were to remain sealed, but also ruled that "plaintiffs have not formally requested sealing of the record on appeal," and left it open for them to do so. (Decision at 18-19.) Appellants hereby accept that invitation and request that the Court order portions of the appellate record sealed as well.

The full record below has been sealed since December 1986 based upon stipulation of the parties at the time of settlement. Prior to that time, the underlying documents which are the subject matter of this suit were sealed during the pendency of the case because of their confidential nature. The trial court has ruled that defendant's actions with respect to the documents constitute conversion, breach of fiduciary duty, and breach of confidence with respect to plaintiff, and conversion and invasion of privacy with respect to Intervenor Mary Sue Hubbard. The appellate record is permeated with references to and discussions of the stolen documents throughout. Under these circumstances, it is appropriate for the Court to order portions of the record on appeal sealed.

II.

THE FACTS OF THIS CASE PROVIDE AMPLE CRITERIA UPON WHICH A SEALING ORDER CAN BE MADE

The documents in this case were kept in the court files

under seal from shortly after the inception of this lawsuit. At that time, Judge Cole of the Superior Court issued a temporary restraining order and then a preliminary injunction requiring defendant to deposit the documents which he had converted from plaintiff with the clerk of the court under seal. They remained under seal up to the time of trial, and many of them continued to be sealed after that time.

Appellants' claims in this case were tried before Judge Breckenridge without a jury in May 1984. At trial, appellants presented their case without introducing any of the private documents so as not to undermine the very privacy rights they brought suit to protect. Nonetheless, at the close of trial, at Armstrong's request, and over appellants' objections, the court admitted into evidence and ordered unsealed a small percentage of the thousands of documents held under seal by the clerk on the ground that they were relevant to Armstrong's defense. These documents were unsealed, and quotations from them and information derived from them entered the trial transcript and pleading file of the case.

On June 20, 1984, Judge Breckenridge issued a Memorandum of Intended Decision, (Exhibit A), which became a Statement of Decision by Minute Order dated July 20, 1984. (Ex. B.) The decision included findings of liability on the part of Armstrong for conversion, breach of fiduciary duty, breach of confidence and invasion of privacy. Judge Breckenridge's Decision ordered certain documents the court had admitted into evidence to be unsealed, but a series of appeals effectively kept these papers under seal until December 1986, when they

were returned to CSC as part of the settlement agreement described below.

After lengthy negotiations, the parties presented Judge Breckenridge on December 11, 1986, with a settlement of Armstrong's countersuit and the injunctive portion of appellants' claims against Armstrong. The injunctive claims were mooted by the return to plaintiff of all but six of the documents which were kept in the court's files because they were in controversy in pending litigation in another case. The returned documents included all documents that had been entered into evidence. An integral, indispensable part of that settlement was the sealing of the court's record[1/] and the stolen documents still held by the court.

The sealing aspect of the settlement was documented in the stipulated Sealing Order executed and entered by Judge Breckenridge on December 11, 1986, (Ex. C):

> The entire remaining record of this case, save only this order, the order of dismissal of the case, and any orders necessary to effectuate this order and the order of dismissal, are agreed to be placed under the seal of the Court.

Ex. C at 2. The cross-complaint was dismissed with prejudice by Judge Breckenridge on that same day, December 11, 1986. (Order Dismissing Action With Prejudice, Ex. D.)

On October 11, 1988, almost two years after the settlement of the case and sealing of the record, non-party Bent Corydon filed his motion to unseal the file. Los Angeles

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1. Because of the court's evidentiary rulings, quotations and information from the private documents did appear in the transcript of the trial and the pleading file.

Superior Court Judge Geernaert went far beyond what Corydon requested and ordered the files totally unsealed. In its July 29, 1991 decision, this Court ruled that the unsealing by Judge Geernaert had been improper, and ordered the files resealed. The Court ruled, however, that the appellate files were not to be sealed, but that plaintiff could move for a sealing order.

The record on appeal consists of various categories of documents, primarily the trial transcripts, trial exhibits, including those which were sealed documents which Judge Breckenridge allowed into the trial record, and briefs discussing those exhibits in detail. Because of the findings of the trial court with respect to appellants' prima facie case against defendant on several causes of action, the fact that the documents involved were stolen from plaintiff in the first place, the permeation of the record with the documents or discussion of them, and the negotiated agreement of the parties that the record be sealed, it is appropriate for this Court to seal portions of the record on appeal as well.

III.

THE APPLICABLE LEGAL STANDARDS PERMIT SEALING OF THE COURT FILE IN THIS CASE

The United States Supreme Court has long recognized as an "uncontested" proposition that "the right to inspect and copy judicial records is not absolute" and that "every court has supervisory powers over its own records and files. . . . " Nixon v. Warner Communications, Inc. (1978) 435 U.S. 589, 598, 98 S.Ct. 1306; see, Champion v. Superior Court (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, 629, quoting in

Matter of Estate of Hearst (1977) 67 Cal.App.3d 777, 783, 136 Cal.Rptr. 821, 824 ("Clearly a court has inherent power to control its own records to protect the rights of litigants before it. . . ."). The Supreme Court has explained that denial of access to judicial records may be appropriate in a variety of situations, including for the protection of privacy interests. Nixon v. Warner Communications, 435 U.S. at 598.

When the Court rendered its decision in this case, its discussion of the sealing of appellate files relied on Champion v. Superior Court (1978) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, a recent case which expounded criteria for the sealing of a record on appeal or portions thereof. The court in Champion noted that the California Rules of Court provided no guidance for its decision, but that appellate courts could adapt to their use the procedures outlined in cases discussing trial court sealing orders. Based upon those cases, the court ruled that parties seeking a sealing order should segregate the documents which should be sealed from those which should not, and should present a factual declaration which explains the needs of the particular case. Id. at 788, 247 Cal.Rptr. at 630. Any such sealing request was itself required by the Champion court to be filed publicly. The arguments in support of sealing were to be presented in a general, non-confidential manner to the extent possible. Id. at 788-789, 247 Cal.Rptr. at 631.

The Court in Champion quoted the opinion in Matter of Estate of Hearst (1977) 67 Cal.App.3d 777, 782-783, 136 Cal.Rptr. 821, 824, where the general rule was stated that

public records should be kept open to the public, but that "countervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good." A number of factors in this case militate in favor of a conclusion that the record on appeal should be sealed based on such considerations.

First, this case involves property and privacy rights of plaintiff and Intervenor Mary Sue Hubbard, as found by the trial court, which fall within the category of "countervailing public policy." The case arose because defendant violated those rights by stealing the proprietary documents, to which he had no legal right. That this is such a case is one factor warranting the sealing of the files. The nature of the documents stolen -- consisting of personal, private, confidential and nonpublic documents -- is a second factor which lends itself to a conclusion that the files should be sealed.

The public policy implications of an unsealing are underscored by the constitutional protection which the right of privacy is afforded in California; see California Constitution, Article 1, § 1, against both governmental and nongovernmental invasions. Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, 829, 134 Cal.Rptr. 839, 841-42. California, in fact, provides broader constitutional protection for privacy rights than does the federal constitution. See, City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 130 n.3, 164 Cal.Rptr. 539, 543 n.3. Personal documents and

information derived from them clearly are protected by the right of privacy in California. E.g., City of Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259, 268, 85 Cal.Rptr. 18; Division of Medical Quality v. Gherardini (1979) 93 Cal.App.3d 669, 678, 156 Cal.Rptr. 55, 60-61.

When a constitutional right to privacy is implicated, the courts do not merely balance that right against the right of access to records. Rather, in such cases the judicial records are presumptively placed under seal. See, Richards v. Superior Court (1978) 86 Cal.App.3d 265, 150 Cal.Rptr.77 (party producing private financial information through discovery is presumptively entitled to a protective order limiting disclosure only to counsel for the other party and only for use in that litigation). Only specific, compelling state interests can overcome that presumption -- and those interests must be expressly articulated by the trial court. See, id. at 272, 150 Cal.Rptr. at 81 ("substantial reason ... related to the lawsuit" is required for disclosure); Britt v. Superior Court (1978) 20 Cal.3d 844, 856 n.3, 143 Cal.Rptr.695, 702 n.3, 574 P.2d 766; Gunn v. Employment Development Dep't. (1979) 94 Cal.App.3d 658, 156 Cal.Rtpr. 584.

Privacy rights, along with trade secrets and other limited types of rights, have long been held to warrant sealing of records. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. at 598; Brown & Williamson Tobacco Corp. v. F.T.C. (6th Cir. 1983) 710 F.2d 1165, 117 cert. denied, 465 U.S. 1100 (1984).

In the analogous area of trade secrets, it is routine for

courts to seal judicial records, in order to:

> [P]rotect the very rights which parties have filed suit to vindicate. The most thorough review of the decisional law in this area states that the object of such safeguarding procedures is, of course, to prevent, so far as possible, the litigation designed to enforce rights in the trade secret from being itself destructive of secrecy and the value of the subject matter of the litigation.

Annot. 62 A.L.R.2d 509, 513. Thus, cases are legion in which courts have ordered that testimony and exhibits regarding business secrets be submitted in camera, sealed and impounded. E.g., A.O. Smith Corp. v. Petroleum Iron Works Co. (6th Cir. 1934) 73 F.2d 531, 539 note, modified on other grounds (6th Cir. 1935) 74 F.2d 934 (trial and appellate records sealed); Vitro Corp. v. Hall Chemical Co. (6th Cir. 1958) 254 F.2d 787, 788 (affirming trial court order impounding transcripts, exhibits and briefs).

Judge Breckenridge was aware in entering the sealing order that the privacy interest of appellants was exceptionally strong. He specifically found that appellants proved a prima facie case of conversion and invasion of privacy. They sought and obtained the sealing order to protect private information quoted or derived from their documents which had been admitted into evidence over their objection. Privacy rights in personal documents and information are entitled to constitutional protection in California. See, e.g., City of Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259, 268, 85 Cal.Rptr. 18; California Constitution, Article 1, § 1; Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, 829, 134 Cal.Rptr. 839, 841. Appellants' privacy

interest in this material will be irreparably harmed if the entirety of the court file is opened to the public.

Numerous courts and commentators have inveighed against such a perverse judicial exacerbation of the very intrusion that a plaintiff seeks to remedy. In United States v. Hubbard (D.C.Cir. 1981) 650 F.2d 293, the Court of Appeals reversed a trial court's order unsealing private Church of Scientology documents. The single most important element in the Court of Appeals decision was the fact that the documents had been introduced as exhibits in a hearing brought on -- as in the instant case -- for the very purpose of protecting defendants' constitutional and common law right of privacy. The court noted that it would be ironic indeed if "one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those privacy interests simply to vindicate them." Id. at 321. The court's order to continue the seal was thus intended to neutralize the "untoward" fact that the mere "initiation of a privacy action itself involves the additional loss of privacy" and "normally multiplies the very effect from which relief is sought." Id. at 307 n.52 (quoting Gavison, Privacy and the Limits of the Law, 89 Yale L.J. 421, 457 (1980), and Emerson, The Right of Privacy and Freedom of the Press, 14 Harv. C.R. - C.L.L. Rev. 329, 348 (1979), respectively). In the instant case, this "most important element" is even more compelling. Appellants here made every effort to vindicate their privacy interests without doing them further damage. Whereas in Hubbard, the documents

were introduced into evidence by the proponents of confidentiality, in this case the proponents opposed the introduction of the documents. Perhaps even more important, while the documents in Hubbard were lawfully seized pursuant to a judicially authorized search warrant, the documents in this case were unilaterally "seized" by a private individual without probable cause and without prior judicial review. The intrusion on privacy is therefore more severe -- and any countervailing justification for publicizing the documents and court records reflecting information from them is correspondingly weaker.

The record on appeal in this case consists of the trial transcripts, the documents constituting the appendix, and the various briefs filed in connection with the appeal. Many of these documents contain some discussion of the converted documents which were sealed by the trial court, as discussed in greater detail in the declaration of Kenneth Long, the individual who worked as CSC's representative in connection with this case, and who is familiar with the appellate record. Because of the compelling reasons discussed herein, and particularly the fact that many of the documents in the appellate record, other than the briefs, are the same documents that have been sealed below for nearly five years, portions of the appellate record should also be sealed.

Another compelling factor warranting sealing of the record on appeal is the fact that there was a negotiated settlement between the parties which provided for sealing and was approved by the trial court, and weighs heavily in favor of sealing of the

identical documents which exist in the appellate record. It is the policy of California's courts to encourage settlements and to enforce judicially supervised settlements. Phelps v. Kozakar (1983) 146 Cal.App.3d 1078, 1082, 194 Cal.Rptr. 872, 874; Fisher v. Superior Court (1980) 103 Cal.App.3d 434, 437, 440-441, 163 Cal.Rptr. 47, 49, 52. The acceptance of orders sealing judicial records as necessary and proper provisions of settlement agreements is supported by reported cases containing references to such orders without criticism or comment. See, e.g., Champion v. Superior Court (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, 628 (requiring an assertion of need for continued sealing when documents are submitted to be sealed in the appellate court); Owen v. United States (9th Cir. 1983) 713 F.2d 1461, 1462.

In In re Franklin National Bank Securities Litigation (E.D.N.Y. 1981) 92 F.R.D. 468, aff'd sub nom. Federal Deposit Insurance Corp. v. Ernst & Ernst (2nd Cir. 1982) 677 F.2d 230 the confidentiality order -- insisted on by one party -- was a critical factor in the settlement of the case. Two years after the case was settled and the order was entered, a non-party moved to intervene to request that the order be modified. The district court held that the "strong public policy favoring settlements of disputes" and "the importance of the stability of judgments and settlements, argue strongly against modification of the order," and that the "[l]apse of time also works against intervenors' position." 92 F.R.D. at 472. The court stated:

> The settlement agreement resulted in the payment of substantial amounts of money and

> induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.

Id. at 472. The principles which underlie the ruling in the Franklin litigation apply as well to the sealing of portions of the appellate court file. Other parties to the lawsuit reached a partial settlement of the case -- which included a monetary settlement of Armstrong's cross-complaint for monetary damages -- in reliance on the order sealing the file. For the same documents which were sealed as a result and other documents discussing the sealed papers, created in relation to the appeal, to be unsealed in the appellate court, works a serious injustice on the plaintiffs.

Indeed, a similar situation to this case was presented most recently to the Eleventh Circuit Court of Appeals in Wakefield v. Church of Scientology of California (11th Cir. 1991) ___ F.2d ___, Slip.Op. 4625 (Exhibit E). In that case, plaintiff Wakefield settled a case with defendant Church, and then repeatedly violated her settlement agreement by violating its confidentiality provisions. The Church brought contempt proceedings against Wakefield, and sought to have the proceedings in camera, in order to protect the very privacy rights placed at issue by Wakefield's conduct. According to the Eleventh Circuit, the district court ordered that contempt proceedings commence before a magistrate, and closed the proceedings to the public and the press stating:

> [D]ue to plaintiff's complete and utter

> disregard of prior orders of this court, the court concludes that any restriction, short of complete closure would be ineffective. . . . Publicity of a private crusade has become her end, not the fair adjudication of the parties' dispute. In doing so, plaintiff is stealing the court's resources from other meritorious cases.

Ex. E, Slip.Op. at 4627.

Various newspapers protested and appealed the closure order. At the conclusion of the closed proceedings, the magistrate found that Wakefield had wilfully violated the court's injunction, and recommended criminal contempt proceedings. The district court granted the newspapers access to some of the transcripts of the hearings, but refused to permit them access to those which discussed the terms of Wakefield's settlement agreement -- that is, those portions of the proceedings which were permeated with discussions of matters which Wakefield and the Church had agreed to keep confidential, and which the Church had brought contempt proceedings to protect. On appeal by the newspapers, the Eleventh Circuit upheld the privacy interests which the Church sought to protect, and refused to grant public access to any more of the record. Id. at 4629 - 4630.

Wakefield demonstrates that the deliberate interjection into judicial proceedings of matters which are unequivocally private to one of the parties, by a recalcitrant litigant who refuses to bend to the orders of the court, should not and must not be permitted to subvert the constitutional protections of the privacy interests of innocent litigants. So, here, this Court should not permit the litigation surrounding the Church's demonstrated privacy interests to subvert their ultimate

protection.

In this case, the trial judge, Judge Breckenridge, in his sound discretion, ordered the sealing of the trial record to facilitate a settlement of this case and to permit appellants to achieve the bargained-for benefit in privacy and property for which they brought the underlying lawsuit. The bargain of the parties which this Court found was to be upheld, not having been challenged for two years after its negotiation and effectuation, is rendered somewhat meaningless if the appellate files are not sealed. If the filing of an appeal to vindicate the right to have files remain sealed results in a ruling that the files are to be sealed in one court but not in another, then the right is nugatory. The challenge of a private litigant two years after the sealing agreement did not make appropriate the unsealing of the files below. It should not do so in this Court either.

Finally, the fact that appellants here were obliged to use the courts to protect their privacy interests is further reason to impose a seal on the appellate record here. In Matter of Estate of Hearst (1977) 67 Cal.App.3d 777, 136 Cal.Rptr 821, the court emphasized that the family had alternatives to reliance on the courts and could have "eschew[ed] court-regulated devices for transmission of inherited wealth and rel[ied] on private arrangements such as inter vivos gifts, joint tenancies, and so-called 'living' or grantor trusts." Id. at 783-84, 136 Cal.Rptr. at 824. The appellants here had no such alternatives for private action. They had no mechanism for recovery of the converted documents other than

bringing this lawsuit. Self-help, in the form of "seizing the documents from Armstrong," was certainly not appropriate, and no court would wish to encourage such action by penalizing a party for seeking to preserve its privacy rights through the courts.

Consideration of the factors above warrants that sealing of the appellate file should be granted. Accordingly, this Court should seal those portions of the appellate record designated in paragraph 8 of the attached Declaration of Kenneth Long.

IV.

CONCLUSION

This case arises out of the wrongdoing of defendant in converting private documents, invading the privacy of Intervenor Mary Sue Hubbard, breaching confidences, and breaching his fiduciary duty to plaintiff. Thus, from its inception, the case deals with violations of plaintiff's and Intervenor's rights. This suit was the only method of vindicating those rights, and it resulted in some of the confidences sought to be protected being revealed in documents which would ordinarily be public. The parties settled the suit and stipulated to the sealing of the files, and the trial court approved that settlement. The fact that this appeal has been filed should not negate the privacy and property interests involved, which weigh heavily in favor of a conclusion that all portions of the record containing stolen documents or

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portions or discussions of them should be sealed both in the trial court and on appeal.

Dated: September 11, 1991

Respectfully submitted,

Eric Lieberman
RABINOWITZ, BOUDIN, KRINSKY, STANDARD & LIEBERMAN, P.C.

BOWLES & MOXON

By: Helena K. Kobrin
Helena K. Kobrin

Counsel for Plaintiff and Appellant

MICHAEL LEE HERTZBERG
Counsel for Intervenor and Appellant MARY SUE HUBBARD

DECLARATION OF KENNETH LONG

I, KENNETH LONG, hereby declare:

1. I am over the age of eighteen. I have been employed by Church of Scientology of California ("CSC") for 9 years as a paralegal, acting as CSC's representative to assist various of its attorneys during that time period. I have personal knowledge of the matters set forth below and would and could competently testify thereto if called upon to do so.

2. During the course of my employment as a paralegal, I have worked extensively on the case of Church of Scientology of California v. Armstrong, Los Angeles Superior Court Case No. C 420153, and Appellate Case No. B025920 ("Armstrong"). I am well familiar with the documents on file in Armstrong, both in the Superior Court and on appeal.

3. The trial transcripts which are part of the Armstrong record consist of 4,346 pages of testimony. The single lengthiest testimony is that of defendant, Gerald Armstrong. His testimony covers approximately 852 pages. Throughout Armtrong's testimony, there was discussion of the documents converted by Armstrong that had been ordered returned to the court and sealed by Judge Cole near the inception of the suit.

4. Discussion of the contents of these documents also occurred during the testimony of other witnesses. Vaughn Young testified for about 136 transcript pages and Laurel Sullivan for roughly 425 pages. Their testimony also included discussion of the stolen documents which had been sealed by the trial court. Thus, between Armstrong, Sullivan and Young,

nearly a third of the trial transcripts contain discussions of the very materials for which suit was originally brought to effect return and maintain privacy.

5. The Armstrong appellate briefs also contain many references to, and descriptions and discussions of the stolen documents which were sealed during this litigation and which were returned to plaintiff upon settlement of the lawsuit in December 1986. A material term of that settlement was the return of those documents and the sealing of the record in this case in order to protect the privacy and property interests of CSC and Intervenor Mary Sue Hubbard, who had initiated this action to vindicate those rights.

6. The appendices filed in the appellate court contain numerous documents that discuss the stolen documents and their contents, or matters arising from those documents. Out of 22 documents in the B038975 appendix, ten contain such references: Exhibits C, H, I, K, L, N, O, Q, U, and V. The appendix for B025920 also contains documents with such references, including pages 57-60 and 251-277.

7. All of the documents in the Armstrong appellate record, with the exception of the appellate briefs, have been sealed below since December 11, 1986 as a result of the stipulation of the parties upon settlement of the case.

8. Accordingly, on behalf of CSC, I respectfully request the Court to seal the testimony of Gerald Armstrong, Vaughn Young and Laurel Sullivan in the Armstrong Reporter's Transcript, pages 57-60 and 251-277 in Armstrong Appellant's Appendix, pages 4-28 of Respondent's Brief in Armstrong, and

Exhibits C, K, L and N in the "Appendix of Appellants" filed in Appeal No. B038975. If these portions of the appellate record are also sealed, it will preserve the property and privacy interests which CSC has fought to protect by its filing of the Armstrong suit, and which the trial court recognized in sealing the documents at the outset of the litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 10th day of September, 1991.

Kenneth Long

Kenneth Long

PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, California 90028.

On September 11, 1991, I caused to be served the foregoing document described as NOTICE OF MOTION AND MOTION TO SEAL RECORD ON APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KENNETH LONG on interested parties in this action as below:

Gerald Armstrong
P.O. Box 751
San Anselmo, CA 94960

Gerald Armstrong
707 Fawn Drive
Sleepy Hollow, California 94960

Toby L. Plevin
Attorney at Law
10700 Santa Monica Blvd.
Suite 4300
Westwood, CA 90025

Los Angeles Superior Court
111 N. Hill Street
Los Angeles CA 90012

If hand service is indicated, I caused the above-referenced paper to be served by hand, otherwise I caused such envelopes with postage thereon fully prepaid to be placed in the United States mail at Hollywood, California.

Executed on September 11, 1991, at Hollywood, California.

Helena K. Kobrin

EXHIBIT C

TOBY L. PLEVIN
ATTORNEY AT LAW
6380 WILSHIRE BLVD, SUITE 1600
LOS ANGELES, CALIFORNIA 90048
(213) 655-3183

Attorney for Plaintiff and
Cross Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| BENT CORYDON,<br><br>Plaintiff,<br><br>vs.<br><br>CHURCH OF SCIENTOLOGY INTERNATIONAL, INC., et<br><br>Defendants<br><br>AND RELATED CROSS ACTIONS | CASE NO. C 694401<br>NOTICE OF MOTION AND MOTION FOR AN ORDER DIRECTING NON-INTERFERENCE WITH WITNESSES AND DISQUALIFICATION OF COUNSEL; DECLARATIONS OF TOBY L. PLEVIN AND BENT CORYDON; REQUEST FOR SANCTIONS<br><br>Date: April 3, 1990<br>Time: 9:00 a.m.<br>Dept: 44 |

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT ON April 3, 1990, at 9:00 a.m. or as soon thereafter as counsel may be heard in Dept. 44 of the above entitled court, plaintiff will move this Court for an order, pursuant to C.C.P. 128(a)(5) enjoining you, your agents, servants, assignees and all those acting in concert with you from communicating with witnesses who have been subpoenaed by plaintiff for deposition or testimony in this action who are signatories to any settlement agreement, and/or release with you and/or from representing witnesses or paying attorneys to

represent witnesses at such depositions. The same order shall be sought as to signatories to any such agreement or release who have not yet been subpoenaed.

This motion will be based on this notice of motion, the declarations of Gerald Armstrong, Toby L. Plevin, Bent Corydon, and the exhibits hereto and is made on the ground that such conduct threatens the integrity of these proceedings in a manner for which Corydon has no adequate recourse and that such an order authorized by C.C.P. 128(a)(5) under which this Court has the power

> "To control in furtherance of justice, the conduct of its ministerial officers and of all other persons in any manner connected with a judicial proceeding before it in every matter pertaining thereto."

Dated: 3/19/90

/s/
Toby L. Plevin, Attorney for Plaintiff.

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I. IT IS GROSSLY IMPROPER FOR DEFENSE COUNSEL TO REPRESENT DEPONENTS WHOSE TESTIMONY HE SOUGHT TO PREVENT TO PROTECT HIS OTHER CLIENTS. IN ADDITION TO AN IMPROPER APPEARANCE, THE CONDUCT, AS DESCRIBED BY GERALD ARMSTRONG, IS CRIMINAL INTERFERENCE WITH A WITNESS

On October 31, 1989, the Church of Scientology filed a Motion for Protective Order to prevent plaintiff Bent Corydon from deposing certain witnesses with highly relevant evidence. Prior to filing that motion, these defendants, through attorney Lawrence Heller, had threatened in writing to sue Corydon's counsel for attempting to serve the witnesses with deposition subpoenas. (See letter of November 3, 1989 from Lawrence E. Heller page 2, paragraph 3, attached hereto as Exhibit A). In another letter, he threatened to seek sanctions if the deposition of Gerald Armstrong were ever to go forward. (See letter of October 17, 1989 of Lawrence E. Heller attached hereto as Exhibit B, page 1, paragraph 4). In his opposition to the motion Corydon enumerated the several areas those witnesses were to testify about which are damaging to Scientology. The Court denied the motion and observed that the defendants could not make a contract to prevent percipient witnesses from testifying. (Plevin Declaration paragraph 2).

Heller (who had drafted the Motion for Protective Order)[1] and the Church of Scientology based the motion and the threats of retaliation upon their contractual arrangements with the prospective witnesses under which the witnesses (many of whom had previously given damaging testimony against Scientology) are

[1]See Heller Declaration, attached hereto as Exhibit C, which was attached to his Motion for Protective Order.

required to keep silent about their knowledge of these defendants unless subpoenaed but which also requires them to avoid service of process.[2] Heller had also been a principal draftsman of those agreements (see Exhibit C) which contain liquidated damages clauses providing for substantial penalties in the event of breach. (See Armstrong Settlement Agreement, Exhibit D hereto, paragraph 7D, page 7).

Given this background, it is undisputed both that the testimony of these witnesses has been sought because it is detrimental to defendants and also that defendants will go to great lengths to prevent that testimony. Accordingly, when the same attorney who had drafted the confidentiality agreements, and who had threatened to sue Corydon's attorney and who had so vociferously opposed these depositions, then appeared at the depositions as counsel for two of the witnesses who are subject to silencing agreements, Ron DeWolf and Howard E. Schomer, it became

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[2]A true copy of the agreement between Gerald Armstrong and a long list of Scientology organizations and individuals is attached hereto as Exhibit D. It has been authenticated by the Armstrong Declaration (Exhibit E hereto) and it states in pertinent part:

> "Plaintiff agrees not to testify or otherwise participate in any other judicial, administrative or legislative proceeding adverse to Scientology or any of the Scientology Churches, individuals or entities listed in Paragraph 1 above unless compelled to do so by lawful subpoena or other lawful process. Plaintiff shall not make himself amenable to service of any such subpoena in a manner which invalidates the intent of this provision..." (emphasis added).

Because of the voluminous nature of the exhibits to the Armstrong declaration, the exhibits are not attached herewith but have been separately filed in the record. The Armstrong Settlement Agreement is Exhibit R to his declaration.

reasonable to question whether some effort is under way to prevent the witnesses from testifying fully and to prevent Corydon from obtaining evidence.[3]

It is anticipated that Heller and the defendants will contend that their sole purpose in approaching Mr. Schomer and Mr. DeWolf and offering to represent them without payment was to prevent discussion of the confidential settlement agreement which was subpoenaed. However, Armstrong states that the defendants (through Heller) wanted to prevent disclosure of much more than just the Settlement Agreement. In paragraph 7 of his declaration he states that Heller "had a problem with (his) responding to deposition questions concerning such things as Hubbard's misrepresentations or (his) period as Mr. Hubbard's archivist." These subjects are central to the proof of the defamation claims and Scientology's specific intent to interfere with publication of Corydon's book as well as other factual issues in this lawsuit.[4] Furthermore, given the bad faith exemplified by the

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[3]In fact, since Mr. Schomer, one of the witnesses, testified that he was not paying for Heller's services and that he assumed the defendants herein were paying, the obvious question that the testimony has been tainted must be given even further weight. (See Excerpts from Schomer Deposition, attached hereto as Exhibit F, at pages marked 24, line 22 to 24.) Ron DeWolf, the son of L. Ron Hubbard, was recently deposed in this case in Carson City, Nevada. Heller represented DeWolf. The same reasons for which Heller's representation of Schomer is improper, so is his representation of Ron DeWolf. DeWolf's settlement with the Church occurred approximately six months before the group settlement of 1986 but is believed to contain the same proscriptions. Plaintiff asks this Court herewith for leave to re-depose DeWolf and to be compensated by Heller for all the costs and fees associated with the original deposition.

[4]In addition, Corydon's attorney stated in oral argument on the Motion for Protective Order that the sole purpose for subpoenaing the agreements was to discover whether they contained any terms which might indicate a concealment of

objections interposed by Heller (that will be further described infra), that position is simply not credible.

Under these circumstances, plaintiff's counsel extensively questioned Schomer at his deposition regarding the circumstances of his retaining Heller. In response, Mr. Schomer denied that he was threatened with a lawsuit for breach of contract if he testified. However, he also testified that he agreed to let Heller represent him because he was "concerned" that he would be sued if he violated the settlement agreement which required him "not to discuss things about the Church (of Scientology)". Schomer Excerpts, Exhibit F page 43, line 12 through page 44, line 12. He also testified that Heller told him that if he testified, Heller would consider it a breach of contract. (Exhibit F, page 73, lines 21-23).[5] Thus, even assuming arguendo

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evidence or obstruction of justice. Other terms such as the amount of the settlement or other usual settlement terms could be deleted. If Heller's concern was truly only to prevent inquiry into the valid terms of the settlement agreement that could have been done by agreement without his representing Schomer and without a motion for protective order.

[5]In spite of Schomer's denial of overt threats, these responses demonstrate not only that his entire testimony is being given under fear of a lawsuit but also that it is subject to the advice of the attorney who drafted that agreement to protect other Scientology clients. This suggests that the entire testimony is tainted. This concern is made the more tangible by the fact that Schomer had previously testified at a trial against Scientology that he was afraid for his life after escaping from Scientology (he had been under guard for three weeks) but now can't recall that testimony. See Schomer Excerpts, Exhibit I, page 3856 to page 3860 and further discussion, infra. Schomer also stated that Heller had not informed him that he represents Author Service Inc. in this lawsuit (the specific Scientology entity that Schomer had previously worked for). Accordingly, thereafter, when, after prompting by Heller, Schomer said that any possible conflicts had been waived, that answer must be viewed with suspicion (Exhibit F, page 78, line 14 -- page 79, line 25).

that the only prior communication between Mr. Heller and the witnesses Schomer and DeWolf included some references to the witnesses' concern that they not violate the silencing provisions of the settlement agreement, nevertheless, such representation raises concern about the integrity of the deposition and the propriety of Heller's conduct. But that is not all there is: The declaration of Gerald Armstrong demonstrates that the communication with the witnesses may involve more than merely an improper appearance. At least as to Armstrong, the direct threats were communicated and an express intent to obstruct discovery was stated.

The Declaration of Gerald Armstrong dated March 15, 1990, Exhibit E hereto, states that Mr. Heller called Armstrong after he had been subpoenaed and asked whether he would be represented by counsel for the deposition. When told no, Mr. Heller then offered to have his client pay for Armstrong's attorney provided that:

> "the attorney would do what [Heller's] client wanted. He said that to maintain the settlement agreement... [Armstrong] should refuse to answer the deposition questions and force Mr. Corydon to get an order from the court compelling [Armstrong] to answer." (Exhibit E, paragraph 4).

At paragraph 7 Armstrong relates this threat from Heller in another conversation:

> "He said I had a contractual obligation and the organization [Scientology] which it had paid a lot of money for, not to divulge confidential information and that if I answered I would have breached the settlement and may get sued."

At paragraph 44 Armstrong states that on a third occasion Heller asked him to provide an untruthful declaration to help prevent

his deposition from going forward. When Armstrong refused Heller again alluded to the contractual obligation not to testify.

While these assertions are extraordinary, they can not be dismissed in light of (1) Heller's written threats to Corydon's attorney, (2) the entire history of "fair game" against enemies of Scientology,[6] (3) Schomer's admitted fear, and (4) the entire purpose of the Settlement Agreements (as more fully described infra ). Furthermore, they are consistent with Armstrong's prior experience with Scientology and its attorneys.

For example, at paragraph 40 Armstrong relates that his prior refusal to cooperate with a Church request following the settlement led to threats by Church attorneys to disclose embarrassing personal information. And, at paragraph 43 he states that in November 1989, after receiving the deposition subpoena in this case, he received a video tape of himself in the mail that had been introduced into evidence against him previously by the Church of Scientology. It came together with the business card of the private investigator who had done the videotaping. It is hard to imagine a more chilling scenario than to receive that sort of "We're watching you" threat in the mail.

Denounced as an enemy of Scientology in 1982 by their publication declaring him a "suppressive person", Mr. Armstrong was a victim of intense fair game activity up until his

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[6]The fair game policy was recently described in Wollersheim v. Church of Scientology of California (1989) 212 Cal.App3d 372 in which the Second District Court of Appeal stated, "As described in the evidence at this trial the fair game policy neutralized the heretic by stripping [(a) person] of his or her economic, political, and psychological power." Id.

settlement with Scientology in December of 1989. His breaking silence now demonstrates remarkable courage. If neither DeWolf nor Schomer is capable of such courage, that means they are only human. However, this Court does not have to sit back and ignore the threats to the truth-finding process that are inherent in fair game policy.

Heller put the planned obstruction of discovery as described to Armstrong into effect at the March 7 Schomer deposition where he instructed Schomer not to answer certain key questions in order to force Corydon to file motions to compel regarding clearly relevant testimony on central issues in this case. For example, Heller refused to let Schomer answer questions regarding his knowledge of Scientology's general use of the fair game policy (that an enemy of Scientology may by "tricked, sued, lied to or destroyed") even though the allegations of fair game are central to the complaint.[7] (See Schomer Deposition Excerpts, Exhibit F, page 132 line 14 to page 134 line 18). Since Heller and the defendants in this lawsuit persist in denying the existence of the fair game policy,[8] plaintiff must have the freedom to broadly

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[7]The fair game policy, attached hereto as Exhibit G, was previously authenticated in this lawsuit by Vicki Aznaran, the ex-President of defendant Religious Technology Center. The fair game policy forms the core of the emotional distress claim and is relevant to issues in all other causes of action. It is also relevant to disprove allegations in the cross-complaint regarding Corydon's motivations to sever ties with Scientology.

[8]In recent trial testimony in Religious Technology Center v. Yanny, LASC Case No. 690 211, Scientology counsel and executives contended that the fair game policy was cancelled in 1969. See Exhibit H hereto, and excerpt of testimony given on January 23, 1990 by Warren Mc Shane an Religious Technology Center official. This was a persistent theme throughout that trial in which Heller was one of the attorneys for the Church of Scientology.

inquire into that area and an experienced attorney like Heller can not reasonably contend otherwise. Thus, this series of instructions not to answer questions is indicative of the defendants' intent to obstruct reasonable discovery.

But Heller's bad faith interference with legitimate discovery did not stop there. Again objecting on the ground of relevance, he also refused to let Schomer answer questions relating to David Miscavige, a defendant in this case, particularly as to his history of violence against Schomer who has previously testified about certain inhuman treatment at Miscavige's hands. (See instructions not to answer at Exhibit F, pages 168-175 and Exhibit I, an excerpt from Schomer's testimony in Christofferson vs. Church of Scientology, at pages marked 3632-3639). Miscavige is accused in this action of ordering physical attacks on Corydon and directing a campaign of fair game against him. Thus evidence of that type of conduct is extremely relevant to this lawsuit.

While the instructions not to answer were the obvious method by which defendants, through their attorney, have improperly interfered with legitimate discovery, the Schomer deposition also made it clear that, at the very least, he was not being fully candid in the responses he did give. For example, in 1985 Schomer testified that, when he gave previous testimony against Scientology, and when he escaped from Scientology, he was afraid for his life. (See Exhibit I, at pages marked 3637 and 3856-3860). Yet when asked to recall that testimony and comment on it in the deposition in this case he did not recall having so testified or why he felt that fear! (See Exhibit F pages 62-64). Similarly, in his prior testimony, Schomer extensively discussed

his pain at the fact that, pursuant to Scientology policy, his daughter had been forced to "disconnect" from him after he left the organization (See Exhibit I, pages 3804-3806). But during this deposition he denied that his daughter had ever disconnected from him. (See Exhibit F, page 148).

Corydon asks the Court to observe the obvious: that Heller's instructions on the ground of relevance can not be the reasonable result of a bona fide difference of opinion but rather demonstrate his and his clients' deliberate plan to sabotage Corydon's deposition efforts and to force Corydon to make motions to compel and to obstruct discovery against the defendants. Corydon hopes that this Court will not sit by while parties and attorneys who have announced their intent to prevent relevant discovery succeed in those efforts at obstruction and undertake actions inconsistent with truth-finding process. Nor can Corydon sit by and watch while witnesses crucial to his case are being swayed and convinced that they can not freely speak because of fear that they will violate the terms of a settlement agreement that is in violation of law and public policy. This Court has the inherent power to control the conduct of the attorneys and parties in this action and can exercise such power to prevent the continuation of this perversion of discovery.

**II. CONTRARY TO DEFENDANTS' ASSERTIONS, THE SETTLEMENT AGREEMENTS ARE NOT LEGAL AND HAVE NOT BEEN APPROVED BY THE COURTS.**

In the summer of 1986, Scientology began negotiations to settle a large number of lawsuits in which the plaintiffs were all represented by Boston attorney Michael Flynn. (Declaration of Heller, Exhibit C hereto). As evidenced by both the Armstrong

Agreement, Exhibit D hereto, and the Bill Franks Agreement, (see Exhibit J previously authenticated in this action by Heller), Scientology demanded that the settlements preclude the settling plaintiffs from cooperating voluntarily with any parties adverse to Scientology but furthermore that they avoid service of subpoenas.[9] In all instances they also required that the several courts in which the cases were pending approve the sealing of the court files of the subject lawsuits as a condition of the settlements. This was stated in the Transcript of Proceedings of December 11, 1986, in the Armstrong case at which some of the settlement terms were presented to Judge Paul Breckenridge. At that time Church attorney Michael Hertzberg stated that sealing was required by Scientology in all the Flynn settlements. (Exhibit K, page 6 lines 17-28).

The settling plaintiffs included all of the known high-ranking Scientologists who had left Scientology and who had specific, first-hand knowledge of Scientology's frauds, criminal acts and fair game activities. With these knowledgeable plaintiffs silenced, any plaintiff who did not settle and future litigants against the Church would be severely disabled from proving their cases since the key evidence on which they needed to rely,

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[9]The text of the relevant clause from the Armstrong Agreement is quoted above in footnote 2. The past testimony of those settling parties (hereinafter the "SIGNATORIES") had included extensive evidence regarding the fair game policy, Scientology's fraudulent recruitment tactics, Scientology's misrepresentations regarding L. Ron Hubbard, the founder of Scientology. Their testimony also included extensive evidence about Scientology's "criminal activities" including the blackmailing of judges and other felonies and the use of parishioners' confessional files to devise fair game strategies against deserters and for use in litigation against them. (Plevin Declaration paragraph 6).

specifically, the knowledge held in the memories and mouths of such silenced witnesses, was in effect secreted and concealed or destroyed.

In December of 1986, the Settlement Agreements were finalized. The Settlement Agreement entered between Scientology and Gerald Armstrong (Exhibit D hereto) contains secrecy clauses in paragraph 7(D) at pages 6-8 and paragraph 7(G) on page 10. At pages 7(H) at pages 10-11 the agreement also requires that Armstrong avoid service of process and is quoted in footnote 2 above. Heller's statements on March 7, 1990 confirmed that Schomer's agreement contains similar language. (Exhibit F, page 50, lines 9-25).

It is anticipated that defendants will assert, as they have repeatedly done, that the agreements in issue have been approved by all the courts in which the settled cases were venued. This is not true. Most recently this was asserted by three of the defendants during the trial of Religious Technology Center et al v. Yanny, LASC Case No. C 690 211, in an effort to prevent Armstrong's testimony in that trial.[10] Attached to their written objection to his testimony were several identical documents captioned "Order Dismissing Action with Prejudice". These recite that the Settlement Agreement for each of the settled cases had been filed in the appropriate court file. (See Exhibit L hereto, Objection to Testimony of Gerald Armstrong at page 4-5 and

[10]Judge Cardenas did not permit Armstrong to testify but his reasoning was not the result of the settlement agreements but rather because the offer of proof regarding Armstrong's testimony indicated, that in Judge Cardenas' view, such testimony should be excluded under Ev. Code section 352.

Exhibit H to that Objection). These Orders had apparently been presented as stipulated orders to the respective courts. Thus, defendants contend that the Settlement Agreements were in fact reviewed and approved by each of the courts involved. However, Corydon has discovered evidence proving that the Settlement Agreement was never seen in at least one instance where the Order Dismissing Action was signed by the trial court. And, in another instance, where the court allegedly has enforced the agreement, the agreement in issue was a modified one and it does not contain the clause regarding avoidance of service.

Specifically, the same Order Dismissing Action was part of the sealed Armstrong file in the case captioned Church of Scientology of California vs Armstrong, LASC Case No. 420 153, which counsel for Corydon saw when Corydon was successful in his motion to unseal that file. See Exhibit M hereto. However, in spite of the language of the order, it was neither in the file nor listed in the Register of Actions. Indeed, when subsequently challenged by Corydon on this point Scientology counsel admitted that the settlement agreement had not been filed. (See Exhibit N hereto, page 3, lines 18-27). Accordingly, the defendants' offer of proof that the subject agreements have been approved and/or filed by other courts is highly suspect and can not be confirmed as long as those other files remain sealed. In fact, the only other settlement document that has surfaced disproves Scientology's contention in the Objection to Armstrong Testimony that the same agreement was approved in a Florida federal court in four cases pending in that court. Specifically, Corydon's attorney, Toby L. Plevin, was asked by Margery Wakefield, one of the signatories to

those agreements, to review the agreement and the transcript of the hearing in which the court considered all four settlements. Unlike the Armstrong and Franks Agreements, the agreement signed by Wakefield and approved by the Florida court does not contain the provision requiring that individuals avoid service of process. Accordingly, there is no evidence that any court has approved the language which Corydon contends is illegal. As the Wakefield settlement agreement referred to is under seal, unfortunately, it can not be attached hereto.[11] (See Plevin Declaration at paragraph 7).

In view of the foregoing, this Court can not and should not consider defendants' anticipated protestation that the agreements have been approved by other courts. That contention appears to depend on sleight of hand.

**III. THE ONLY REMEDY FOR SUCH IMPROPER CONDUCT IS TO DISQUALIFY COUNSEL AND TO RESTRAIN DEFENDANTS' AND COUNSELS' CONTINUING MISCONDUCT.**

Scientology has sought to suppress the evidence of subpoenaed witnesses not only by motion but also by express threats of lawsuits against one of the witnesses and against counsel for plaintiff for merely subpoenaing these persons. As to another witness, the threat was, at the very least, an implied one. While it is conceivable that Heller's subsequent representation of deponents at the same depositions he sought to prevent may be

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[11] While Plevin is constrained by the seal not to produce it or discuss its terms, the foregoing statement about what is not contained in the agreement is necessary to prevent defendants from misleading this Court as they apparently misled Judge Cardenas when submitting the objection to Mr. Armstrong's testimony wherein they represented that these settlements had been universally approved.

consistent with a waiver of the conflict between his clients and the deponents, nevertheless, in light of the foregoing efforts at suppression, it is simply not conceivable that there is no tacit agreement or intent in such waiver to continue to suppress evidence. While a future motion to compel may cure the suppression caused by a deliberate scheme to make improper objections on relevance grounds, no such motion can cure the likely lack of candor, or indeed, the misrepresentation that may be the result of the representation of these witnesses by their former adversary because they fear Scientology will sue them if they testify. Accordingly, Heller must be removed as counsel before the continuation of the Schomer deposition and be removed as well from continued representation of DeWolf.

For this Court to countenance the representation of a witness by the attorney who sought to suppress his evidence pursuant to a contract the attorney drafted that was designed to prevent testimony adverse to his clients and who has threatened another witness with a lawsuit would be to sanction their complete disrespect for the truth-finding process and for the canons of ethics.[12]

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[12]It is also inconsistent with an attorney's professional duties which include the mandate at Business and Professions Code, section 6068(d) the duty "to employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth". And, of course, the Rules of Professional Ethics prohibit the suppression of evidence. Furthermore, Corydon believes that the actions of Heller and the defendants herein are felony violations of one or more provisions of the Penal Code dealing with attempts to influence witnesses and/or to persuade them not to testify. See Penal Code sections 136 et seq.

Accordingly, plaintiff seeks an order as follows:

(1) that no defendant herein, their attorneys, agents, employees or associates, communicate with any witness that has been subpoenaed or who in the future is subpoenaed by plaintiff who has entered into any settlement agreement or mutual release with or for the benefit of any defendant herein;

(2) that no attorney for any defendant herein represent any deponents subpoenaed by plaintiff in connection with any depositions herein;

(3) that no defendant herein, or their attorneys, agents, employees or associates pay or offer to pay for attorneys to represent any deponent in this lawsuit subpoenaed by plaintiff or suggest to deponents the names of any attorneys;

(4) that defendants, each of whom are beneficiaries of the settlement agreements which are the subject of discussion herein, prepare a statement that plaintiff can include with deposition subpoenas to ex-Scientologists in the future containing the following language:

"TO ALL PERSONS WHO HAVE SIGNED SETTLEMENT AGREEMENTS WITH CONFIDENTIALITY CLAUSES WITH ANY AND ALL SCIENTOLOGY ENTITIES:

> PLEASE NOTE, BY ORDER OF LOS ANGELES SUPERIOR COURT, THE UNDERSIGNED HEREBY ADVISES YOU THAT YOU CAN NOT BE SUED FOR BREACH OF CONTRACT FOR TESTIFYING FULLY AND CANDIDLY AT SUCH DEPOSITIONS." Religious Technology Center, Church of Scientology International, Church of Scientology of California, Author Services Inc, Bridge Publications Inc, Scientology Missions International;

(5) that attorney Heller be disqualified from representing Mr. Schomer and Mr. DeWolf and that he advise Mr. Schomer to confer directly with Ms. Plevin regarding the continuation of his deposition or retain other counsel in that connection;

(6) that the commission for the deposition of Ron DeWolf be re-issued by this Court so that he may be deposed again without the presence of Mr. Heller as counsel;

(7) that because the conduct complained of herein demonstrates such complete bad faith without colorable reason, defendants be ordered to pay sanctions of $4,899. 75 per the Declaration of Toby L. Plevin paragraph 8.

Date: 3/19/90

/s/
Toby L. Plevin, Attorney
for Plaintiff

DECLARATION OF TOBY L. PLEVIN

I, Toby L. Plevin, declare as follows:

1. I am counsel of record for Bent Corydon in the within proceeding.

2. There is no Transcript of Proceedings of the hearing at which this Court considered defendants' motion for a protective order. However to the best of my recollection, when ruling on defendants' motion the Court stated that they could not prevent percipient witnesses from testifying.

3. Submitted herewith as Exhibits A and B are true copies of letters I received from Lawrence Heller dated November 3, 1989 and October 17, 1989, respectively.

4. Lawrence E. Heller has appeared as counsel for deponents in this matter, Ronald DeWolf and Howard E. (Homer) Schomer on February 19 and March 7, respectively.

5. Attached as Exhibit I is a true copy of excerpts from testimony given by Schomer in another lawsuit. The entirety of his testimony is being lodged separately with the Court. 6.I have read many pages of testimony in several lawsuits and many declarations by signatories against Scientology. These people were called to testify against Scientology and testified at length about fraud, violence, other criminal activities of Scientology, the abuse of confidences and many other things damaging to Scientology.

7. I have reviewed the Settlement Agreement of Margery Wakefield which was one of four reviewed and approved at the same time in a Florida federal court. Unlike the Armstrong and Franks agreements, that agreement does not contain the provision

requiring that individuals avoid service of process. Accordingly, there is no evidence that any court has approved the language which Corydon contends is illegal. As the Wakefield settlement agreement referred to in this is under seal, unfortunately it can not be attached hereto.

8. I am cognizant of this Court's admonition to counsel in this case not to request sanctions as a matter of routine. However, the conduct which has forced plaintiff's counsel to prepare this motion is egregious and can have no pretext of being consistent with the ethical duties attorneys are sworn to uphold. Accordingly, I request sanctions to reimburse plaintiff for the substantial expenditures involved in the DeWolf and Schomer depositions because the misconduct described herein has rendered those efforts wasteful. Plaintiff seeks sanctions under C.C.P. section 128.5, separate and apart from remedies that may be available pursuant to motions to compel, in the amount of $4,899.75 as follows: (a) the court reporter fees for the DeWolf deposition $656.00; (b) the court reporter fees for the first day of the Schomer deposition, $1,143.75; (3) attorney fees for both depositions (12 hrs times $175.00), totalling $2,100.00; (4) attorney travel time and travel expenses to Carson City Nevada, $900.00.

Sworn under penalty of perjury under the laws of the State of California this 19th day of March, 1990.

/s/

Toby L. Plevin, Attorney for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA )
COUNTY OF LOS ANGELES ) SS

I an a resident of the county of Los Angeles; I an over the age of eighteen years and am not a party to the within entitled action; my business address is 6380 Wilshire Blvd. Suite 1600, Los Angeles Ca. 90048.

On MARCH 19, 1990 I served the following documents described as: Notice of Motion & Motion for Order Directing Non-Party Heller

on interested parties in this action by placing a true copy thereof in sealed envelop(s) addressed as follows:

William Drescher
Wyman Bautzer et al
2049 Century Park East 14th Fl
Los Angeles, CA 90067

Lawrence E. Heller
Turner Gerstenfeld et al
8383 Wilshire Blvd. Suite 510
Beverly Hills, Ca. 90211

Kendrick Moxon
Bowles and Moxon
6255 Sunset Blvd. Suite 2000
Hollywood, Ca. 90028

Michael Hertzberg
740 Broadway - 5th Floor
New York, New York 10003
(FED EX)

_____ BY MAIL

I am fully familiar with my office's mail collection and preparation practices and procedures and I deposited said envelop(s) in accordance with my office's mail pick-up procedure for delivery on the same day to the U.S. mail with first class postage.

_____ BY FACSIMILE TRANSMISSION

I caused said envelops to be transmitted by facsimile to the persons and offices listed above.

X BY PERSONAL SERVICE

I caused said envelops to be delivered by hand to the persons and offices listed above.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at Los Angeles, California on March 19, 1990.

Toby L. Plevin

EXHIBIT D

I, GERALD ARMSTRONG, declare and state that:

1. I am the defendant and cross-complainant in the case of Church of Scientology of California vs. Gerald Armstrong, Los Angeles Superior Court No. C420153. I was a member of Scientology from 1969 to 1981 and have been involved in litigation with various Scientology entities, hereinafter referred to as "the organization", since 1982. I have testified approximately 47 days in trials or depositions in at least 10 cases against Scientology. I am very knowledgeable in Scientology litigation and operations, and am qualified to render the opinion in Paragraph 7 below.

2. In 1985 and throughout 1986, I worked as a paralegal in the law firm of Flynn, Joyce and Sheridan in Boston, Massachusetts. I worked on all the organization-related litigation handled by the firm during that period. Michael Flynn was the prime mover in much of the organization-related litigation throughout the United States until December 1986 when he settled all the cases in which he was involved. I was represented in Armstrong by Flynn, Joyce and Sheridan and the law firm of Contos and Bunch in Woodland Hills, California until the settlement.

3. In a declaration I executed December 25, 1990, which I filed in the California Court of Appeal in the organization's appeal (Civ. No. B038975) from a Superior Court ruling unsealing the Armstrong court file, which had been sealed in December, 1986, I detailed the circumstances of and my involvement in the settlement. In that declaration, I waived the attorney-client privilege between Mr. Flynn and me only as to our

conversations concerning the settlement, and I reiterate that waiver at this time, and extend it to include my other attorneys.

4. During the settlement negotiations and thereafter, I learned from Mr. Flynn, and two other attorneys in both firms which represented me in Armstrong, that all the attorneys who had been involved in the organization-related litigation had agreed, as part of the settlement, to not represent or assist anyone in any future litigation against the organization.

5. Each of the law firms involved was also required, as part of the settlement, to turn over to the organization its Scientology-related documentary evidence, as was each of the litigants. Each of the litigants, moreover, was required, as part of the settlement, to not assist any aggrieved party in future litigation against the organization, and to avoid service of process in such litigation. These conditions are stated in the settlement agreement I signed in December 1986, a copy of which is marked and exhibited herewith as Exhibit "1".

6. Since the settlement, the organization's attorneys have threatened me on six occasions that I would be sued if I violated the settlement's restrictions. The organization meanwhile has itself violated the letter and spirit of the settlement regarding me on numerous occasions. I have detailed these instances in my December 25, 1990 declaration and a declaration I executed on March 15, 1990 which was also filed in the above-referenced appeal.

7. The effects of the December 1986 settlement agreements in the legal community and on future individuals aggrieved by the organization are obvious. Potential attorneys,

knowing or learning that they would be denied the documentary evidence which had previously been available, denied assistance from the key witnesses against the organization, and denied assistance from the most knowledgeable attorneys in the world in this field of litigation would be more than reluctant to accept representation of aggrieved individuals. Add to that, the general knowledge in the legal community of the harassive and threatening practices of the organization toward adverse attorneys, and the fact that well respected attorneys such as Mr. Flynn had agreed to an unethical or illegal settlement to escape the litigation, and it is no surprise that this country's attorneys avoid representing the organization's many victims. The victims are effectively cut off from communication with witnesses and access to evidence, and their ability to obtain any legal representation denied.

I declare under the penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and based on my personal knowledge, except those matters stated on information and belief, and as to those matters, I am informed and believe them to be true.

Executed this 16th day of July, 1991, at Los Angeles, California.

GERALD ARMSTRONG

EXHIBIT E

Margery WAKEFIELD, Plaintiff,

v.

The CHURCH OF SCIENTOLOGY OF CALIFORNIA, Defendant-Appellee,

Times Publishing Company and Tribune Company, Appellants.

No. 89-3796.

United States Court of Appeals, Eleventh Circuit

Aug. 12, 1991.

Religious organization sought orders to show cause why plaintiff, which had brought suit against organization, should not be held in civil and criminal contempt for violating confidentiality requirement of settlement agreement. Newspapers' motions for access to contempt hearings and related pleadings, proceedings, and records, to determine if their reporters' qualified privilege prevented them from being compelled to testify, was denied by the United States District Court for the Middle District of Florida, No. 82-1313 CIV-T-10, Elizabeth A. Kovachevich, J., and newspapers appealed. The Court of Appeals, Hatchett, Circuit Judge, held that newspapers' appeal from order denying them access to contempt hearings did not fall within capable of repetition, yet evading review exception to mootness doctrine.

Case dismissed

1. Federal Courts ⇐721

Newspapers' appeal from order denying newspapers' motions for access to evidentiary hearing at which hearing newspaper reporters had been subpoenaed did not satisfy requirements for capable of repetition, yet evading review exception to mootness doctrine after hearing was held, and newspaper which had reported on case did not seek to intervene until two years after closure, and case involved unique circumstances, such as plaintiff's "constant disregard and misuse of the judicial process," on which closure order was based. U.S.C.A. Const.Amend. 1.

2. Federal Courts ⇐611

Parties may make alternative claims, change claims, or sometimes file inconsistent claims, but may not do so in appellate court, Court of Appeals reviews case tried in district court and does not try ever-changing theories parties fashion during appellate process.

3. Federal Courts ⇐723

When addressing mootness, Court of Appeals determines whether judicial activity remains necessary.

4. Federal Courts ⇐723

Three exceptions to mootness doctrine exist: issues are capable of repetition yet evading review; appellant has taken all steps necessary to perfect appeal and to preserve status quo; and trial court's order will have possible collateral legal consequences.

5. Federal Courts ⇐723

Capable of repetition, yet evading review exception to mootness doctrine applies if challenged action is of too short a duration to be fully litigated prior to its cessation, and reasonable expectation exists that same complaining party will be subject to same action again.

6. Federal Courts ⇐723

Mere hypothesis or theoretical possibility is insufficient to satisfy test for capable of repetition, yet evading review exception to mootness doctrine.

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Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and COX Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

We dismiss this case, which at one time touched upon important first amendment issues, because the case has been rendered moot.

## FACTS

Margery Wakefield and three other plaintiffs alleged that the Church of Scientology of California (the Church) committed various wrongful acts against them. On August 14, 1986, Wakefield, the other plaintiffs, and the Church entered into a settlement agreement which included provisions enjoining Wakefield and the other plaintiffs from discussing, with other than immediate family members, (1) the substance of their complaints against the Church, (2) the substance of their claims against the Church, (3) alleged wrongs the Church committed, and (4) the contents of documents returned to the Church. The district court approved the settlement agreement, sealed the court files, and dismissed the case with prejudice. The dismissal order specifically gave the court jurisdiction to enforce the settlement terms. Nonetheless, Wakefield publicly violated the settlement agreement's confidentiality provisions.

In 1987, both the Church and Wakefield filed motions to enforce the settlement agreement. The district court requested that a magistrate judge address whether either party had violated the settlement agreement. On September 9, 1988, the magistrate judge issued a report and recommendation which concluded that Wakefield had violated the settlement agreement, and the Church had fully complied with the agreement's terms and conditions. On November 3, 1988, the Times Publishing Company (the Times), which publishes the *St. Petersburg Times*, moved to intervene in this lawsuit, to unseal the court files, and to gain access to any contempt hearings. In its motions, the Times alleged that the sealed court records and closed proceedings violated its and the public's constitutional and common law rights of access to judicial proceedings and records. In opposing the motions, the Church argued that they were untimely and barred by laches. On May 16, 1989, the district court adopted the magistrate judge's report, issued a preliminary and permanent injunction against Wakefield, and referred the Times's motion to intervene to the magistrate judge.

Notwithstanding the court's injunction, Wakefield continued to publicize the lawsuit. Thus, on July 18, 1989, the Church sought orders to show cause why Wakefield should not be held in civil and criminal contempt. The Church also sought damages, costs, and attorney's fees. To support its requests, the Church submitted excerpts of newspaper, television, and radio interviews attributed to Wakefield.

On August 15, 1989, the magistrate judge submitted a report and recommendation addressing Times's motion to intervene. He recommended that absent a compelling reason, all future proceedings and the court files, except for documents pertaining to the settlement, should be open and that Times be allowed to intervene. Due to events discussed later in this opinion, the district court has not issued a final order on these issues.

The district court scheduled an evidentiary hearing to address the Church's contempt motion. As witnesses at the hearing, the Church subpoenaed reporters for the *St. Petersburg Times* and the *Tampa Tribune*. Consequently, the Times, and the Tribune Company, which publishes the *Tampa Tribune* (the newspapers), filed motions for access to hearings, pleadings, proceedings, and records related to the contempt hearings in order to determine if their reporters' qualified privilege prevented them from being compelled to testify.

## PROCEDURAL HISTORY

On September 11, 1989, the district court held an *in camera* proceeding to rule on the newspapers' motions. The district court denied the newspapers' motions for access to the hearings because the Church subpoenaed the reporters only to establish the source and accuracy of the statements attributed to Wakefield. The district court also held that the reporters waived any privilege by publicly attributing the statements to Wakefield.

In considering the newspapers' motions, the district court stated, "due to the plaintiff's complete and utter disregard of prior orders of this court, the court concludes that any restriction short of complete closure would be ineffective." It further held that "[p]ublicity of a private crusade has become her end, not the fair adjudication of the parties' dispute. In doing so, plaintiff is stealing the court's resources from other meritorious cases." Thus, the district court closed the contempt proceedings to the public and the press referring further proceedings to a United States Magistrate Judge. The magistrate judge began contempt hearings on September 11, 1989.

On September 18, 1989, the newspapers filed a Notice of Appeal, a Motion for Expedited Appeal, and a Motion for Stay Pending Appeal. On September 29, 1989, this court granted expedited appeal, but denied the newspapers' emergency motion for a stay of the contempt proceedings pending resolution of the expedited appeal.

On appeal, the newspapers argued that the closure violated their first amendment and common law rights of access to judicial proceedings. They contended that the public's right of access outweighs the rationale for keeping the settlement agreement confidential. The Church contended that Wakefield's "open and defiant contumacious conduct" mandated closure and that the newspapers did not enjoy an absolute constitutional or common law right of access to civil proceedings.

During our first oral argument, we learned that the newspapers had never requested the district court to allow access to the contempt hearing transcripts. Since the hearings had been completed before oral argument, we issued a November 17, 1989, order which temporarily remanded the case to the district court for the limited purpose of allowing the newspapers to seek access to the contempt hearing transcripts. The order further instructed the district court to rule on such a request "within a reasonable time."

On June 25, 1990 eight months after the last contempt hearing the magistrate judge submitted a report and recommendation which concluded that Wakefield had willfully violated the court's injunction. He further held that while a civil contempt finding could be appropriate, he suggested the case be referred to the United States Attorney's office for prosecution on the criminal contempt charges. The district court has not issued a final order addressing whether Wakefield is in civil or criminal contempt.

Furthermore, almost a year after our temporary remand, the district court had not ruled on the newspapers' requests for access to the contempt hearing transcripts. Thus, the newspapers filed a motion requesting that this court clarify the "reasonable time" language in the November 17, 1989 order. In order to speed finalization of this matter, this court denied the clarification motion, but issued an order stating, "[a]fter December 3, 1990, this court will entertain a request for relief addressing the delay that has occurred since our remand to the district court provided that relief has been sought." After this clear signal for action, the district court issued a November 21, 1990 order unsealing the civil contempt proceeding transcripts, except for those portions which disclosed the settlement agreement terms.

On March 21, 1991, the newspapers filed a motion requesting a second oral argument, which the Church opposed. On April 18, 1991, we granted the newspapers' motions for a second oral argument, instructing the parties to address (1) whether the case was moot, (2) whether a case or controversy remained, and (3) whether a reasonable possibility of settlement existed.

## ISSUE

The sole issue we discuss is whether this case is moot.

## CONTENTIONS

The newspapers argue that this case is not moot because the court can grant relief which will affect the parties by ordering release of all the judicial documents relating to the contempt hearing and the unreleased transcript pages.

The Church contends that this case is moot and does not present a case or controversy which this court may address. It emphasizes that the newspapers initially sought access to the proceedings to represent their reporters, then under subpoena. It argues that this aspect of the case is absolutely moot because the Church released the reporters from their subpoenas.

## DISCUSSION

[1, 2] This case, at its beginning, presented an interesting and important issue: under what circumstances may civil judicial proceedings be closed to the public and the press? Unfortunately, the newspapers did not prevail in their efforts to halt the proceedings; this court denied their motions to stay the proceedings pending the expedited appeal. The newspapers argue that we should address whether a constitutional right of access to civil proceedings exists. To do so, however, would constitute an advisory opinion. The hearing that is the subject of this case terminated almost two years ago. Although the newspapers have an interest in the constitutional question, perhaps for future cases, no "live" case or controversy remains in this case. The hearings have been completed, and the newspapers have been given the hearing transcripts.[1]



[3] When addressing mootness, we determine whether judicial activity remains necessary. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 n. 10 (1975). "A case becomes moot, and therefore, nonjusticiable, as involving a case or controversy, 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *B & B Chemical Co. v. United States E.P.A.*, 806 F.2d 987, 989 (11th Cir.1986) (quoting *United States v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980)).

[4] Three exceptions to the mootness doctrine exist: (1) the issues are capable of repetition, yet evading review; (2) an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo, and (3) the trial court's order will have possible collateral legal consequences. *B & B Chemical Co.*, 806 F.2d at 990.

The newspapers argue that this case falls within the "capable of repetition yet evading review" mootness exception. They argue that a case is not moot if this court can grant relief that affects the interested parties. *Airline Pilots Association v. U.A.L. Corp.*, 897 F.2d 1391 (7th Cir.1990); *Wilson v. U.S. Department of Interior*, 709 F.2d 591 (9th Cir.1986). Thus, they assert that we should order the release of all the judicial documents related to the contempt hearing and the unreleased transcript pages. In their view, these documents are essential so that the public can understand what happened to Wakefield.

[5] The newspapers do not meet the exceptions' two conditions in order for the capable of repetition, yet evading review exception to apply: (1) the challenged action must be of too short a duration to be fully litigated prior to its cessation, and (2) a reasonable expectation must exist that the same complaining party will be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975).

As an example of the action's short duration, the newspapers assert that they acted promptly by filing during the contempt proceeding's adjournment a motion for a stay pending the appeal of the district court's closure. The record refutes this assertion. The underlying case has been in the federal court system since November 29, 1982. Even prior to the 1986 closure, the Times reported on the Wakefield case, but not until 1988, did Times seek to intervene. Additionally, the newspapers did not appeal the closure order until the contempt hearing had been adjourned for a continuance. These facts refute the newspapers' assertions of the action's short duration.

Likewise, the newspapers cannot satisfy the second condition. In addressing the

1. It is also noteworthy that the newspapers have changed their claims as the case has progressed. They first sought access on constitutional and common law grounds, then they sought access to protect their reporters from compelled testimony. Finally, with full knowledge that the hearings had been completed, the newspapers never sought the hearing transcripts until prompted to do so by this court. Now, with all but eleven pages of the hearing transcript, the newspapers seek the eleven pages on constitutional and common law grounds. Many of the theories presented to this court were never presented to the district court. Parties may make alternative claims, may change claims, may sometimes file inconsistent claims, but parties may not do so on the appellate court. This court reviews the case tried in the district court; it does not try ever-changing theories parties fashion during the appellate process.

second condition, the newspapers argue that if this court does not offer judicial guidance, a "reasonable expectation" exists that this controversy will occur again. They specifically state that they "continue to expect and suspect that secret church proceedings are being or will be held," and suspect that the Church will bring contempt proceedings against the other plaintiffs. The record does not support these suspicions.

[6] This case involves unique circumstances which are not easily repeated. Wakefield's constant disregard and misuse of the judicial process mandated partial closure. Since Wakefield's contempt hearing concluded, the Church has not instituted nor has the district court conducted any additional contempt hearings, show cause hearings, or *in camera* proceedings. Furthermore, nothing indicates that the Church contemplates these actions. Although the newspapers' suspicions that secret church and contempt proceedings will occur constitute a theoretical possibility, a mere hypothesis or theoretical possibility is insufficient to satisfy the test stated in *Weinstein Morgan v. Roberts*, 702 F.2d 945, 947 (11th Cir.1983). Thus, no "reasonable expectation" exists that this controversy will occur again.[2]

The newspapers' interest in the important constitutional issue which was once alive in this case is understandable. Nevertheless, we must wait for another case with a current controversy, and with a well-developed record to address the issue. The fact that much of the delay in this case is attributable to a busy and overburdened federal district court is unfortunate.

Because the newspapers cannot satisfy the capable of repetition, yet evading review requirements, this case is moot. Accordingly, this case is dismissed.[3]

DISMISSED.

2. As earlier noted, the hearings were not halted because the newspapers did not prevail on their motions for stay pending appeal. We must assume that in the proper cases stays will be granted.

3. We express no opinion on whether the remaining eleven pages of the transcripts may properly be sought in another federal lawsuit.

**EXHIBIT F**

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 89-3505
Non-Argument Calendar

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District Court Docket No. 81-174-CIV-T-17

NANCY McLEAN, and
JOHN McLEAN, her son,

Plaintiffs-Appellants,

versus

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,
MARY SUE HUBBARD, L. RON HUBBARD,
JOSEPH PETER LISA, MILTON WOLFE and
MERKEL VANNIER,

Defendants-Appellees.

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Appeal from the United States District Court
for the Middle District of Florida

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(September 17, 1991)

Before [illegible]OFLAT, Chief Judge, JOHNSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Appellant McLean appeals the district court's order permanently enjoining her from disclosing any information about her lawsuit against

the Church of Scientology (Church) and the resulting Settlement Agreement entered into between McLean and the Church. We affirm.[1]

I

McLean and her son sued the Church in 1981. In August 1986 McLean and the Church entered into a court-supervised Settlement Agreement requiring the Church to pay an undisclosed sum to McLean and requiring McLean to turn over to the Church any documents relating to the litigation and prohibiting McLean from, among other things, discussing with anyone, other than immediate family members, the circumstances surrounding the litigation or discussing any factual evidence that might have supported the litigation. In March 1988 the Church moved for a preliminary and a permanent injunction, claiming

[1] The outcome of this decision was delayed pending final resolution of the issues in Wakefield v. Church of Scientology, ___ F.2d ___ (11th Cir. 1991) (finding moot the motion filed by local newspapers seeking access to the Settlement Agreement entered into among the Church and various plaintiffs ). Because the Wakefield decision has no impact on the merits of this case, we need discuss it no further.

that McLean was violating the terms of the Settlement Agreement and that she should be enjoined from further violations.[2]

The district court referred the matter to a magistrate judge. The magistrate judge admitted into evidence affidavits submitted by the Church, indicating that McLean had violated the terms of the settlement agreement. The magistrate judge also heard testimony from McLean, who was given a full opportunity to rebut the matters contained in the affidavit. After considering the matter, the magistrate judge issued a Report and Recommendation concluding that McLean violated the Agreement. The district court accepted the Report and Recommendation and entered against McLean a preliminary and a permanent injunction that enjoined her from further disclosing the substance of her complaint and claim against the Church, alleged wrongs committed by the Church and the substance of documents that were returned to the Church under the Settlement Agreement. This appeal followed.

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[2] Because the record in this case is under seal, our outline of the underlying facts of this appeal will be cursory.

II

McLean claims that the permanent injunction against her further disclosures should be reversed because the district court failed to give her proper notice that it consolidated the preliminary- and permanent-injunction hearings. We disagree. Although "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits," University of Texas v. Camenisch, 101 S. Ct. 1830, 1834 (1981) (citations omitted), Rule 65(a)(2) of the Federal Rules of Civil Procedure allows consolidation of the preliminary-injunction hearing and the hearing on the merits of the permanent injunction. Fed. R. Civ. P. 65(a)(2). Before preliminary- and permanent-injunction hearings can be consolidated, though, parties must have notice of consolidation. Id.; Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1106 (5th Cir. 1972).[3] The district court's failure, however, to give notice "is not a sufficient basis for appellate reversal; [McLean] must

[3] This court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

also show that the procedures followed resulted in prejudice, i.e., that the lack of notice caused [Mclean] to withhold certain proof which would show [her] entitlement to relief on the merits." Id.; cf. Garcia v. Smith, 680 F. 2d 1327, 1328 (11th Cir. 1982). After reviewing the record, we conclude that McLean has not been prejudiced.

At the preliminary-injunction hearing, McLean testified among other things that she had reacquired certain documents turned over to the Church and that she was using these documents to "counsel" Church members. She testified further that she had discussed certain aspects of her suit against the Church with persons who were not members of her immediate family. If we view this testimony in the light most favorable to McLean and if we assume that any evidence she might have presented at a later hearing on the merits would have fully corroborated her testimony, we would still find that she violated the terms of the Settlement Agreement. So, because McLean in effect conceded that she was violating the terms of the Settlement Agreement, we conclude that she was not prejudiced by being denied notice of the consolidation of her preliminary and permanent injunction hearings.

McLean also argues on appeal that the district court erred in holding that reacquisition and disclosure of reacquired documentary evidence violated the Settlement Agreement. We find this argument to be completely without merit. If the district court had held that reacquisition alone violated the Settlement Agreement, we might be influenced. The district court, however, held that reacquisition and then disclosure violated the Settlement Agreement. We agree.

III

For the foregoing reasons, we AFFIRM the district court's order of preliminary and permanent injunctive relief to the Church.

PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, California 90028.

On October 7, 1991, I caused to be served the foregoing document described as NOTICE OF MOTION AND MOTION TO SEAL PRIOR SETTLEMENT AGREEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Hollywood, California, addressed as per the attached Service List.

If hand service is indicated on the above list, I caused the above-referenced paper to be served by hand.

Executed on October 7, 1991 at Hollywood, California.

Peter M. Jacobs

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